Supreme Court, U. S.
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No. 80-883

IN THE

Supreme Court of the United States

October Term, 1980

HARTZELL PROPELLER, INC., a Corporation,

and

Petitioner,

PIPER AIRCRAFT COMPANY, a Corporation, and AVCO LYCOMING ENGINE GROUP, a Division of Avco Corporation

v.

GAYNELL REYNO, as Personal Representative of the Estates of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran and Peter Cunningham Scott,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Must a motion to dismiss on grounds of *forum non conveniens* be denied whenever the law of the alternate forum is less favorable to recovery than that which would be applied by the district court?

2. Is the choice of forum of a non-resident alien plaintiff entitled to the same weight as that of a citizen or resident plaintiff in consideration of a motion to dismiss on grounds of *forum non conveniens*?

3. Under what circumstances does the determination of a district court that factors of public interest and factors of private interest, such as availability of compulsory process, ease of access to sources of proof, view of the scene, and ability to implead third parties weigh in favor of dismissal of an action on grounds of *forum non conveniens* constitute an abuse of discretion?

4. Must a party seeking dismissal of an action on *forum non conveniens* grounds identify with particularity witnesses and the substance of their testimony in order for the factor of convenience of witnesses to be weighed in favor of its motion to dismiss? [1]

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1. Parties to the proceeding in the United States Court of Appeals for the Third Circuit were: Gaynell Reyno, as personal representative of the Estates of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott; Piper Aircraft Company; and Hartzell Propeller, Inc.

Petitioner Hartzell Propeller, Inc. has no parent company or affiliates. Piqua Aircraft Company is a subsidiary of Hartzell Propeller, Inc.

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OPINIONS

The opinion of the United States District Court for the Middle District of Pennsylvania is reported as: *Reyno v. Piper Aircraft Co.*, at 479 F. Supp. 727 (1979) (A44).

The opinion of the United States Court of Appeals for the Third Circuit is unreported to date. (A1)

JURISDICTION

On July 24, 1980, the United States Court of Appeals for the Third Circuit rendered the judgment which petitioner seeks to have reviewed. On August 7, 1980, that court granted petitioner's motion for an extension of time to file petition for rehearing to August 15, 1980. Petitioner's petition for rehearing before that court *en banc* was filed on August 15, 1980. On August 27, 1980, the United States Court of Appeals for the Third Circuit denied petitioner's petition for rehearing *en banc*.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1) (1976).

STATEMENT OF THE CASE

On July 27, 1976, a commercial aircraft crashed in the Scottish highlands, near the town of Talla. The pilot and all five passengers were killed.

The pilot and passengers were all Scottish subjects and left Scottish survivors.

The aircraft involved in the accident was a seven-year-old twin-engine Piper PA 23-250 aircraft manufactured by Piper Aircraft Company (Piper), a Pennsylvania corporation. The propellers of the aircraft were manufactured by Hartzell Propeller Inc. (Hartzell), an Ohio corporation.

The aircraft was operated by McDonald Aviation, Ltd., a Scottish air taxi service. It was owned and maintained by another Scottish firm, Air Navigation and Trading, Ltd. Those firms came to own, maintain and operate the aircraft by some series of transactions unknown to Hartzell.

Preceding the crash, the aircraft was under the control of Scottish air traffic control. No eyewitnesses to the impact have been located. However, a number of investigators and witnesses regarding the background of the aircraft and of the pilot have been found in the United Kingdom.[2]

It was determined in an adversary proceeding in Edinburgh, at which the estates of the deceased passengers had the opportunity to present evidence,[3] that

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2. *See* Affidavit of Ronald C. Scott, *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727 (M. D. Pa. 1979), printed *infra* at pp. A75-77.

3. R. 163. "R" refers to the record appendix filed in the court of appeals. *See* Appendices to Appellant's Opening Brief, *Reyno v. Piper Aircraft Co.*, No. 79-2747 (3d Cir. filed July 24, 1980) *rehearing denied* (3d Cir. filed August 27, 1980).

the pilot had been flying in violation of his own company's flight regulations.[4] The review board found that the airplane struck the ground in a tailspin and that there was inadequate evidence to demonstrate any mechanical failure in the aircraft.[5]

The law of Scotland, while affording decedents' survivors avenues of relief, does not now provide for a claim by the personal representative of the estate of a decedent, an unlimited claim for damages for wrongful death, or a claim grounded in strict liability in tort.[6]

Litigation arising from this accident is pending in the courts of the United Kingdom. An action has been brought against Piper, Hartzell, Air Navigation and Trading, Ltd., and McDonald Aviation, Ltd. on behalf of the estate of the one decedent not a party to the instant case, the pilot. The survivors of other decedents, represented herein, have also brought suit against Air Navigation and Trading, Ltd. and McDonald Aviation, Ltd. Hartzell and Piper are not parties to that action.

Gaynell Reyno ("Reyno") of California, not a real party in interest herein, was appointed administratrix of the estates of the deceased passengers by a California court. Reyno brought a wrongful death and survival action in the Superior Court of California on behalf of those estates against various defendants, including Hartzell and

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4. R. 179-181. Talla is located in a mountainous area of Scotland. The pilot was flying in an area noted for "mountain waves." "Mountain waves" are areas of severe turbulence caused by winds crossing the mountains. The review board found that the pilot was flying in violation of his company's regulations respecting altitude of flight in such areas. *Id.*

5. R. 181-82.

6. R. 99-100; *Reyno v. Piper Aircraft Co.*, No. 79-2747 at 26, 30-31, and 37.

Piper.[7] The complaint sounded in negligence and strict liability in tort.[8]

The action was removed to the United States District Court for the Central District of California by petition in August, 1977.[9] Hartzell contended that it was not subject to the jurisdiction of California courts. It did not join in the petition for removal.

When the action was recommenced in the District Court for the Central District of California, Hartzell filed a motion to dismiss for lack of jurisdiction or, in the alternative and in the event jurisdiction was found to exist, for transfer pursuant to 28 U. S. C. § 1404(a) (1976).[10]

In November, 1977, Piper filed a motion for transfer pursuant to 28 U. S. C. § 1404(a) (1976).[11]

On December 21, 1977, the District Court for the Central District of California entered an order which granted the motion of Piper to transfer [12] and quashed service of

7. R. 1-12. The complaint also named Avco Lycoming Engine Group, a Division of Avco Corporation ("Avco"), as a defendant. R. 1-12.

8. R. 1-12.

9. R. 14-20. On November 28, 1977, the District Court for the Central District of California granted Avco's motion to dismiss the actions as to it. *Reyno v. Piper Aircraft Co.*, No. CV-77-3181-IH (C. D. Cal. Nov. 28, 1977) (order granting motion to dismiss).

10. R. 36-54. The contingent character of Hartzell's application for transfer was clear from the motion and memorandum in support thereof. *See* R. 37, 41 and 49. Further, the contingent character of the application was recognized by the District Court for the Central District of California, R. 83, the District Court for the Middle District of Pennsylvania, *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 729 (M. D. Pa. 1979) and the Court of Appeals for the Third Circuit, *Reyno v. Piper Aircraft Co.*, No. 79-2747, at 3 (3d Cir. 1980).

11. R. 68-79.

12. R. 84.

process as to Hartzell.[13] The district court declined to dismiss the action as to Hartzell in view of its order transferring the action to the Middle District of Pennsylvania, where valid service on Hartzell could be made.[14]

Following transfer, plaintiff made service of process on Hartzell in the Middle District of Pennsylvania.

Hartzell filed a motion to dismiss on grounds of *forum non conveniens*.[15] Piper filed a similar motion styled a request for judgment on the pleadings or summary judgment.[16]

The district court for the Middle District of Pennsylvania granted the motions of Hartzell and Piper and dismissed the action on *forum non conveniens* grounds.[17]

Respondent appealed to the United States Court of Appeals for the Third Circuit. On July 24, 1980, that court reversed the district court and remanded the action.[18] On August 7, 1980 the court of appeals granted Hartzell's motion for an extension of time in which to file a petition for rehearing to August 15, 1980. Hartzell filed a petition for rehearing before the court *en banc* on August 15, 1980. The court denied that petition on August 27, 1980. This petition for a writ of *certiorari* followed.

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13. R. 84.

14. R. 84.

15. R. 93-104.

16. Motion of Defendant Piper Aircraft Co. for Judgment on the Pleadings or for Summary Judgment, *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727 (M. D. Pa. 1979).

17. *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727 (M. D. Pa. 1979). The dismissal was granted on condition that Hartzell and Piper submit to personal jurisdiction in Scotland and waive any Scottish statute of limitations. *Id.* at 738.

18. *Reyno v. Piper Aircraft Co.*, No. 79-2747 (3d Cir. filed July 24, 1980), *rehearing denied* (3d Cir. filed August 27, 1980).

ARGUMENT

The decision of the court of appeals below, which conflicts with decisions of this court and other courts of appeals, is a sweeping transformation and redefinition of the doctrine of *forum non conveniens* which threatens to reduce the doctrine to a nullity. This decision concerns a recurring question of federal civil procedure with significant domestic and international economic implications.

In support of its petition for a writ of *certiorari* petitioner respectfully asserts as follows:

I. The Decision Below Conflicts With the Decision of Another Court of Appeals as to the Disposition of a Motion to Dismiss on *Forum Non Conveniens* Grounds Where the Law of the Alternate Forum Is Less Favorable to Recovery, and Presents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

In the decision below, the court of appeals reiterated a position in direct conflict with that of the Court of Appeals for the Second Circuit on a point critical to continued viability of the doctrine of *forum non conveniens.*

As noted above, this action against American manufacturers is based upon allegations of negligence and strict liability. It is brought on behalf of the estates of Scottish decedents in connection with an aircraft accident in Scotland. Scottish law does not presently recognize a cause of action for strict liability in tort.

A question exists as to whether respondent's case against Hartzell is governed by the law of Pennsylvania or Scotland. The district court concluded that Scottish law, which does not now recognize strict liability, applied.[19] The court of appeals disagreed and determined

19. 479 F. Supp. at 736-37.

that Pennsylvania law, which recognizes strict liability,[20] applied.[21]

So finding, the court of appeals then concluded that the action could not be dismissed,[22] as dismissal would result in a change in applicable law.[23] The court stated:

> Even under the district court's choice of law analysis . . . it is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case . . . . Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.[24]

This position is not a novel development. It reaffirms a doctrine previously enunciated by the Court of Appeals for the Third Circuit.[25]

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20. *Webb v. Zern*, 422 Pa. 424, 220 A. 2d 853 (1966).

21. *Reyno v. Piper Aircraft Co.*, No. 79-2747, at 34-37.

22. *Id.* at 22-23.

23. *Id.* at 22. The court observed that the affidavit of Scottish counsel before the district court indicated that upon a dismissal and subsequent trial in Scotland, Scotland, under its *lex loci delecti* choice of law rule for torts, would apply its own law to the claims.

24. Id. at 22-23.

25. *See De Mateos v. Texaco, Inc.*, 562 F. 2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U. S. 904 (1978). The stance taken in *De Mateos* is the result of misapplication of the principle of *Van Dusen v. Barrack*, 376 U. S. 612, 626-43 (1964), that a transfer pursuant to 28 U. S. C. § 1404(a) (1976) should not work a change in applicable law. The *De Mateos* panel determined that "[t]hat principle is no less applicable to a dismissal on *forum non conveniens* grounds." 562 F. 2d at 899.

The *De Mateos-Reyno* rule directly conflicts with the position of the Court of Appeals for the Second Circuit. In *Fitzgerald v. Texaco, Inc.*,[26] plaintiffs argued that their action should not be dismissed on *forum non conveniens* grounds, as the law to be applied in the alternate forum was less attractive to recovery.[27] The court concluded that

> [a] district court has discretion to dismiss an action under the doctrine of *forum non conveniens* . . . even though the law applicable in the alternative forum may be less favorable to the plaintiff's chance of recovery. A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover.[28]

Fitzgerald is the settled law of the Second Circuit.[29]

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25. (Cont'd.)

That language is quoted with approval in the decision below. *Reyno v. Piper Aircraft Co.*, No. 79-2747, at 22. *See also Dahl v. United Technologies Corp.*, Nos. 79-2596-9, at 11 (3d Cir. filed August 7, 1980).

26. 521 F. 2d 448 (2d Cir. 1975), *cert. denied*, 423 U. S. 1052 (1976).

27. The court summarized plaintiffs' argument as follows:

> Plaintiffs claim that the difference between the interpretation by the English and American courts of general maritime law might adversely affect their chances of prevailing on the merits, and that 'the ends of justice' require that they be allowed to retain the advantageous interpretations of the law made by their chosen forum, even if, under all the other criteria, that forum is an inconvenient one.

521 F. 2d at 452.

28. *Id.* at 453 (citation omitted).

29. *See Koupetoris v. Konkar Intrepid Corp.*, 535 F. 2d 1392, 1397 n. 22 (2d Cir. 1976); *Danser v. Firestone Tire & Rubber Co.*, 86 F. R. D. 120, 122 (S. D. N. Y. 1980); *Shepard Niles Crane &*

A conflict between the Courts of Appeals for the Second and Third Circuits on this issue is momentous. Much of the litigation of foreign claims involving issues of *forum non conveniens* would be expected to occur in those circuits and the districts of which they are comprised. A major portion of American maritime commerce takes place in those circuits. Vast numbers of American manufacturers are incorporated in the district of Delaware and/or maintain their principal place of business in the southern district of New York. In preparation of this petition counsel for petitioner examined eighty-seven decisions involving the doctrine of *forum non conveniens.* Fifty-nine of those decisions (or approximately sixty-eight percent) were rendered by courts of appeals or district courts within the Second and Third circuits.[30]

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29. (Cont'd.)

Hoist Corp. v. Fiat S.p.A., 84 F. R. D. 299, 306 (W. D. N. Y. 1979), *quoting Fitzgerald, supra* n. 26, at 453; *Abouchalache v. Hilton International Co.*, 464 F. Supp. 94, 94 (S. D. N. Y. 1978), *quoting Fitzgerald, supra* n. 26, at 453; *Texaco Trinidad, Inc. v. Astro Exito Navegacion, S. A., Panama*, 437 F. Supp. 331, 334 (S. D. N. Y. 1977), *quoting Fitzgerald, supra* n. 26, at 453. *Texaco Trinidad* presents an excellent example of application of the *Fitzgerald* rule. There, plaintiff's potential recovery in the action in the American forum was $5,000,000. The district court dismissed the action despite the fact that plaintiff's recovery would be limited to $710,000 under the law to be applied in the alternative foreign forum. 437 F. Supp. at 333-34.

30. The geographical breakdown of decisions consulted is as follows: First Circuit—one (or one percent); Second Circuit—forty-six (or fifty-three percent); Third Circuit—thirteen (or fifteen percent); Fourth Circuit—four (or five percent); Fifth Circuit—six (or seven percent); Sixth Circuit—one (or one percent); Seventh Circuit—one (or one percent); Eighth Circuit—five (or six percent); Ninth Circuit—seven (or eight percent); Tenth Circuit—zero (or zero percent); and District of Columbia Circuit—three (or three percent).

A conflict of this magnitude between the two circuits which most frequently apply and interpret the doctrine of *forum non conveniens* will confuse district judges nationwide. It is a serious impediment to uniformity of federal law.

Furthermore, the decision of the court below threatens to destroy the viability of the doctrine of *forum non conveniens.* As was aptly observed in *Fitzgerald,* it is hardly to be expected that a plaintiff will choose a forum which will apply law disadvantageous to recovery. Surprisingly, the decision below creates a danger which one member of the panel had previously recognized. As then district judge Higginbotham observed, "we live in an international community and by definition from the view of certain interests the laws of some other countries may be more or less favorable to that special interest. But we are not a super-court of international jurisdiction . . . ."[31] The instant decision is the realization of Judge Higginbotham's fear. A foreign plaintiff unsatisfied with the law of his own nation may now, by artful forum-shopping, force a district court to adjudicate a claim with no connection whatever to that forum.

Thus the decision below repudiates a delicate process of weighing numerous factors mandated by this Court,[32] in favor of a one-dimensional methodology for resolution of issues of *forum non conveniens* which elevates a plaintiff's choice of forum to a position of supremacy. This Court and other courts of appeals have assiduously avoided promulgating inflexible rules for the disposition of motions to dismiss for *forum non conveniens.* As Justice Clark observed, the question of whether to dismiss on *forum non conveniens* grounds is "peculiarly one for the exercise of judgment by those in daily proximity to

31. *Xerakis v. Greek Line, Inc.,* 382 F. Supp. 774, 777 (E. D. Pa. 1974).

32. *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501 (1947).

these delicate problems of trial litigation." [33] This decision precludes the exercise of such judgment and, therefore, consideration of other public and private interests recognized by this Court.[34] The effect of the decision below is a substantial alteration of the doctrine of *forum non conveniens* and a significant departure from the standards established in *Gulf Oil Corp. v. Gilbert.*[35]

Further, a practical result of the decision is to establish the district courts as world courts. By the rule announced by the court below, a citizen of any nation, injured anywhere in the world, may seek from an American manufacturer, whose product was allegedly involved to any extent in the accident, damages measured by an American standard. If the law of the plaintiff's nation does not provide avenues or measures of relief deemed satisfactory to him, he is openly encouraged to litigate in a United States district court with attractive substantive law and conflict of laws principles, and is guaranteed that, no matter how tenuous the connection between the forum and the case, the case may not be dismissed as inconvenient. Forum shopping is thus transformed to an art form.

The decision below also presents troubling questions regarding the role of the federal courts and American law in the world. Implicit in the conclusion of the court of appeals is a belief in some inherent superiority or righteousness of American law which justifies its world-wide application. Such an ethnocentric view was rejected by this Court in *M/S Bremen v. Zapata Off-Shore Co.*,[36]

33. *J. F. Pritchard & Co. v. Dow Chemical of Canada, Ltd.*, 462 F. 2d 998, 1000 (8th Cir. 1972) (Mr. Justice Clark, sitting by designation).

34. *See Gilbert, supra* n. 32.

35. 330 U. S. 501 (1947).

36. 407 U. S. 1907 (1972).

wherein it was aptly noted that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." [37]

Moreover, it is highly questionable whether such open-ended disbursement of American jurisprudence is appropriate or necessary. First,

> [i]t is by now plain that the sole reason for making of claims by foreigners in the United States is that damage awards are, by and large, higher and that the contingent fee system enables persons not otherwise able to meet the cost of litigation in the United States at no financial risk to themselves. [sic] [38]

Whether this development and the instant case, which further encourages such foreign claims, are consistent with the proper role of the federal courts, should be settled by this Court.

The conclusion of the court below that the doctrine of *forum non conveniens* is confined to cases in which the law to be applied in the district court is only equally or less favorable to recovery than that which would be applied in the courts of plaintiff's own nation will have far-reaching domestic and international economic implications. All American manufacturers will be significantly affected by this decision. In time, the consequences of the instant case will touch all American consumers.

Strict liability in tort has gained far less acceptance

37. *Id.* at 1913.

38. Address of Peter Martin, Solicitor of the Supreme Court, London, United Kingdom, *Litigation of Claims Arising Out of Foreign Aircraft Accidents*, Before the Section on Insurance, Compensation, and Negligence Law, Committee on Aviation and Space Law, 1980 Annual Meeting of the American Bar Association, Honolulu, Hawaii, August 4, 1980.

abroad than it has in the United States.[39] Given the status of products liability law abroad and the rule announced by the Court below, the result mandated by the decision below is clear. So long as strict liability is not the law of a given nation, any citizen or subject of that nation who brings an action in a district court which applies strict liability is absolutely insulated from the possibility of a *forum non conveniens* dismissal, no matter how inconvenient litigation in the district court might be. Such, in fact, was the result in the decision below.

The economic impact of such a rule will be momentous. Under this rule, American manufacturers will be placed at a tremendous competitive disadvantage *vis-à-vis* foreign competitors in both the domestic and foreign markets. For example, an American manufacturer whose product is exported to a non-strict liability nation may be strictly liable before the courts of the United States for product-related injuries which may occur in the non-strict liability nation. Yet its foreign competitor will not be so liable before the courts of its nation for product-related injuries which may occur there. Inevitably, the disproportionate amounts which must be spent by the American manufacturer to satisfy judgments constitutes an increased cost of business and must be reflected in pricing policy. Just as inevitably, an inequitable upward price pressure is an erosive influence upon the American manufacturer's ability to meet its foreign competition in the domestic and foreign markets. Further, it is elemental that the manufacturer's increased costs must be passed on to American consumers.

Ignoring the wise counsel of one district court that "courts have an obligation to consider the effect on com-

39. *See* Hollenshead & Conway, *An Overview: International Products Liability*, 16 TRIAL 50 (November, 1980); Orban, *Product Liability: A Comparative Legal Restatement—Foreign National Law and the EEC Directive*, 8 GA. J. INT. & COMP. L 342 (1978).

merce of the application of certain traditional legal principles to international legal disputes,"[40] the court of appeals rendered the instant opinion without consideration of its potential for economic damage. Petitioner respectfully submits that the court was clearly in error. In any case, the gravity of the decision renders it appropriate for consideration by this Court.

This Court's last thorough consideration of *forum non conveniens* came over thirty years ago.[41] In light of the potential impact of the decision below, the reliance upon a previous decision of this Court[42] to support the *De Mateos-Reyno* rule,[43] and the length of time since this Court has spoken, this case presents an important question of federal law which has not been, but should be, settled by this Court.

II. The Decision Below Conflicts in Principle With the Decisions of This Court, Conflicts With the Decisions of Other Courts of Appeals, Adds to a General State of Confusion Among the Lower Federal Courts, and Presents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court: Whether the Choice of Forum of a Non-Resident Alien Plaintiff Is Entitled to the Same Weight in Consideration of a Motion to Dismiss on Grounds of *Forum Non Conveniens* as That of a Citizen or Resident Plaintiff.

The court below determined that a defendant's burden on a motion to dismiss on *forum non conveniens*

40. *Shepard Niles Crane & Hoist Corp., supra* n. 29, at 303.

41. *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947); *Koster v. Lumbermens Mutual Casualty Co.*, 330 U. S. 518 (1947).

42. *Van Dusen v. Barrack, supra* n. 25.

43. *See* note 25, *supra*. The application of *Van Dusen* further impliedly raises the question of to what extent principles relevant to transfer pursuant to 28 U. S. C. § 1404(a) are applicable to disposition of questions of *forum non conveniens*.

grounds is not affected by whether or not the plaintiff is an American citizen.[44] Thus, the court of appeals in effect concluded that the choice of forum of a non-resident alien plaintiff is entitled to the same weight upon consideration of such a motion as that of a citizen plaintiff. That decision is the latest addition to a murky body of law which calls for resolution by this Court.

The decision of the court of appeals conflicts in principle with the decision of this Court in *Swift & Co. Packers v. Compania Colombiana del Caribe.*[45] There this Court recognized that citizenship of the parties was relevant in disposition of a motion to dismiss on *forum non conveniens grounds,* noting that "[a]pplication of *forum non conveniens* principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners."[46]

The decision below also conflicts with the position taken by the Courts of Appeals for the Second, Fifth, and Eighth Circuits on this question. In *Farmanfarmaian v. Gulf Oil Corp.*,[47] the court affirmed a district court decision[48] which dismissed on *forum non conveniens* grounds

44. *Reyno v. Piper Aircraft Co.*, No. 79-2747 at 12-13.

45. 339 U. S. 684 (1950).

46. *Id.* at 697. The preferred position of the choice of forum of an American citizen was reflected in this Court's conclusion that

> it was improper under the circumstances here shown to remit a United States citizen to the courts of a foreign country without assuring the citizen that respondents would appear in those courts and that security would be given equal to what had been obtained by attachment in the District Court.

Id. at 697-98. *See also Canada Malting Co. v. Paterson Steamships,* 285 U. S. 413 (1932).

47. 588 F. 2d 880 (2d Cir. 1978).

48. *Farmanfarmaian v. Gulf Oil Corp.*, 437 F. Supp. 910 (S. D. N. Y. 1977), *aff'd,* 588 F. 2d 880 (2d Cir. 1978).

"the claim of a foreign plaintiff, whose choice of forum should be given less weight than the choice of an American plaintiff . . . ."[49] The rule in *Farmanfarmaian* is bolstered by other decisions of the Court of Appeals for the Second Circuit[50] and the district courts[51] of which it is composed indicating citizenship of the parties is to be considered.

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49. 437 F. Supp. at 927. The district court also stated that the right of a foreign plaintiff to sue in American courts "is clearly of lesser magnitude than that of an American citizen." *Id.* at 923.

The opinion herein inaccurately stated that the court of appeals in *Farmanfarmaian* "disapproved" the district court's enunciation of the application of the *forum non conveniens* to noncitizens. *Reyno v. Piper Aircraft Co.*, No. 79-2747 at 13. To the contrary, *Farmanfarmaian* held that the district court's characterization has no application "where . . . a treaty between the United States and the foreign plaintiff's country allows nationals of both countries access to each country's courts on terms no less favorable than those applicable to nationals of the court's country." 588 F. 2d at 882. No such treaty is applicable herein.

Similarly, *Alcoa Steamship Co., Inc. v. M/V Nordic Regent*, 1980 A. M. C. 309 (2d Cir. 1980), cited by the court below, *Reyno v. Piper Aircraft Co.*, No. 79-2747, at 13, does not go as far as that court's interpretation would suggest. In this respect, *Nordic Regent* holds only that a *forum non conveniens* dismissal may not be denied strictly because the plaintiff is an American citizen.

50. *Fitzgerald, supra* n. 26, at 451; *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F. 2d 1326, 1344 (2d Cir. 1972); *Olympic Corp. v. Societe Generale*, 462 F. 2d 376, 378 (2d Cir. 1972); *Thomson v. Palmieri*, 355 F. 2d 64, 65 (2d Cir. 1966); *Vanity Fair Mills v. T. Eaton Co.*, 234 F. 2d 633 (2d Cir.), *cert. denied*, 352 U. S. 871 (1956).

51. *Ionescu v. E. F. Hutton & Co. (France) S. A.*, 465 F. Supp. 139, 145 (S. D. N. Y. 1979), *appeal docketed*, No. 79-7221 (2d Cir. filed March 28, 1979); *Malka v. E. F. Hutton & Co., Inc.*, 465 F. Supp. 131 (S. D. N. Y. 1979), *appeal docketed*, No. 79-7209 (2d Cir. filed March 13, 1979); *Abouchalache, supra* n. 29, at 97; *Texaco Trinidad, supra* n. 29, at 333-34; *Top Form Mills Inc. v. Sociedad Nationale Industria Applicazioni Viscosa*, 428 F. Supp.

The decision of the court below also conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Burt v. Isthmus Development Co.*,[52] wherein the court considered it "inconsistent with the very purpose and function of the federal courts to hold that one may decline to hear a case and thereby in effect decree that a citizen must go to a foreign country to seek redress of an alleged wrong."[53]

The decision below additionally conflicts in principle and/or by implication with *J. F. Pritchard & Co. v. Dow Chemical of Canada, Ltd.*,[54] where the court of appeals for the Eighth Circuit emphasized plaintiffs' status as assignee of a foreign corporation in affirming a dismissal on *forum non conveniens* grounds.[55]

The decision of the court below is not supported by the view of the Court of Appeals for the Ninth Circuit in *Mizokami Bros. of Arizona, Inc. v. Baychem Corp.*,[56] which concluded that American citizenship of the plaintiff, standing alone, is not sufficient ground for opposition to a motion to dismiss for *forum non conveniens*.[57] The fol-

51. (Cont'd.)

1237, 1253 (S. D. N. Y. 1977); *Alegria v. Grand Bassa Tankers, Inc.*, 337 F. Supp. 401, 403 (S. D. N. Y. 1971); *Maybruck v. Haim*, 290 F. Supp. 721, 725 (S. D. N. Y. 1968); *John Fabick Tractor Co. v. Penelope Shipping Co.*, 278 F. Supp. 182, 183 (S. D. N. Y. 1967); *Horovitz v. Renault, Inc.*, 162 F. Supp. 344, 346 (S. D. N. Y. 1958).

52. 218 F. 2d 353 (5th Cir.), *cert. denied*, 349 U. S. 922 (1955).

53. 218 F. 2d at 357.

54. 462 F. 2d 998 (8th Cir. 1972).

55. *Id.* at 1002.

56. 556 F. 2d 975 (9th Cir. 1977) (per curiam), *cert. denied*, 434 U. S. 1035 (1978).

57. 556 F. 2d at 978.

lowing statement of the court indicates that *Mizokami* involved a situation far different from that herein:

> The plaintiff falls back on its United States citizenship as the sole and only possible basis for suing defendants in a court of the United States. This is not enough. In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere.[58]

Thus, a conflict as to the issue presented exists between the decision below and the decisions of the Courts of Appeals for the Second, Fifth, and Eighth Circuits. The divergence between those decisions, as well as the varied pronouncements of other federal courts,[59] indicates the confusion that accompanies consideration of the question. Similar disagreement and confusion exists among commentators. One commentator has suggested that *forum*

58. *Id.*

59. *See Founding Church of Scientology of Washington, D. C. v. Verlag*, 536 F. 2d 429 (D. C. Cir. 1976); *Aigner v. Bell Helicopters, Inc.*, 86 F. R. D. 532, 546 (N. D. Ill. 1980); *Michell v. General Motors Corp.*, 439 F. Supp. 24 (N. D. Ohio 1977); *Del Monte Corp. v. Everett Steamship Corp.*, 402 F. Supp. 237 (N. D. Cal. 1973); *McCarthy v. Canadian National Railways*, 322 F. Supp. 1197 (D. Mass. 1971).

The decision below even conflicts in principle with previous decisions of the Third Circuit. *See Hoffman v. Globerman*, 420 F. 2d 423 (3d Cir. 1970); *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F. 2d 611 (3d Cir.), *cert. denied*, 385 U. S. 945 (1966). *See also Reavis v. Gulf Oil Corp.*, 85 F. R. D. 668, 670 (D. Del. 1980), *citing Swift & Co. Packers, supra* n. 45, *Xerakis, supra* n. 31, at 776.

non conveniens should be held inapplicable whenever any defendant in an action is an American corporation,[60] another that residence in the United States is just one of the factors to be weighed in consideration of the doctrine,[61] another that no deference is due the American citizenship of a defendant corporation,[62] and yet another that it may be appropriate to grant an American defendant's motion where the plaintiff is an alien.[63]

This question is one to which this Court's attention is deserved. Resolution of the impact of citizenship on *forum non conveniens* requires judgment respecting the role of the federal judiciary which only this Court is equipped to provide. As one observer noted:

> U. S. citizens are entitled to know whether they may be denied access to a U. S. court merely because it is deemed to be inconvenient. In view of the confusion among the circuits over such questions, the Supreme Court could profitably elaborate its views on an area of the law which it has not addressed directly in three decades. Considering the volume of international trade and investment today, such an effort is long overdue.[64]

The instant case presents the opportunity for such essential review.

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60. Kennelly, *Transitory Tort Litigation—The Need for Uniform Rules Pertaining to In Personam Jurisdiction, Forum Non Conveniens, Choice of Laws, and Comparative Negligence*, 22 TR. L. GUIDE 422, 465 (1979).

61. Morley, *Forum Non Conveniens—Restraining Long-Arm Jurisdiction*, 68 NW. L. REV. 24, 42 (1973).

62. 7 TEX. INT. L. J. 513, 515 (1972).

63. 17 VA. J. INT. L. 755, 778 (1977).

64. *Id.* at 791.

III. The Decision of the Court Below Conflicts With the Decisions of This Court as to What Constitutes an Abuse of Discretion by a District Court in the Determination to Dismiss an Action on Grounds of *Forum Non Conveniens* and Presents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The court below recognized that the standard of review of a district court dismissal on *forum non conveniens* grounds is whether the district court abused its discretion.[65]

The term "abuse of discretion" is not susceptible of precise definition. However, this Court has developed general principles to guide courts of appeals in application of the proper standard. In *The Belgenland*,[66] this Court quoted with approval the statement that an abuse of discretion exists where "the judge has exercised his discretion on wrong principles or that he has acted so absolutely differently from the view which is held by the court of appeals, that they are justified in saying he has exercised it wrongly."[67]

In *Williams v. Green Bay & Western Railroad*,[68] this Court determined that an abuse of discretion in resolving a *forum non conveniens* motion arises where the district court fails to consider factors critical to a proper disposition. The district court herein met its obligation to give judicious consideration to the factors which must be considered in connection with a motion to dismiss on *forum*

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65. *Reyno v. Piper Aircraft Co.*, No. 79-2747, at 14. *See Gulf Oil Corp. v. Gilbert*, *supra* n. 32, at 508.

66. 114 U. S. 355 (1885).

67. *Id.* at 368.

68. 326 U. S. 549 (1946).

non conveniens grounds. After enumerating[69] those factors, as were set forth by this Court in *Gulf Oil Corp. v. Gilbert*,[70] the court then gave careful consideration to each of those factors. Unlike the district court in *Williams*, which had ignored important facts, the district court in the instant case carefully considered both the private and public interests involved in considering a *forum non conveniens* dismissal. The district court's analysis was completely consistent with the requirement, for example, that it weigh the relative advantages of each forum and not merely consider the drawbacks of one.[71]

Due to the district court's judicious consideration, the court of appeals could not demonstrate an abuse of discretion. Instead, that court merely substituted its judgment. For example, the district court found that defendants' inability to implead third parties would be unfair and unduly burdensome.[72] The court of appeals differed with the district court and stated:

> We therefore conclude that defendants' inability to implead other potentially liable parties would indeed make litigation here more burdensome, but defendants have not shown that it would also be unfair. *It is properly a factor in their favor on the motion to dismiss, but it is not as weighty as they contend.*[73]

Such a substitution of judgment was criticized by this Court in *Gulf Oil Corp. v. Gilbert*.[74] There the district

69. 479 F. 2d 730.

70. 330 U. S. 508.

71. *Founding Church of Scientology, supra* n. 59, at 436.

72. 479 F. Supp. 733.

73. *Reyno v. Piper Aircraft Co.*, No. 79-2747 at 20 (emphasis added).

74. 330 U. S. 511.

court had dismissed the complaint even though the plaintiff assured the court that it would bring all the necessary witnesses from Virginia to the court in New York.[75] The court of appeals reversed, in part based upon its objection to the district court's refusal to accept the plaintiff's assurances.[76] In reversing the court of appeals' decision that the district court had abused its discretion, this Court stated that "such matters are for the district court to decide in the exercise of sound discretion." [77]

The district court also determined that the necessity of a view of the wreckage and accident scene was one of the factors which pointed to Scotland as the appropriate forum for this litigation.[78] The court of appeals took exception to that decision in part because it was "unclear whether the trial judge in fact ascribed any significant weight to this element . . . ." [79] The court of appeals also asserted that "the topography of Scotland may, to the extent relevant, be readily proved by testimony." [80] Again, the court of appeals substituted its judgment for the trial court's judgment.[81] The trial judge considered

75. *Id.*

76. *Id.*

77. *Id.*

78. 479 F. Supp. at 732.

79. *Reyno v. Piper Aircraft Co.*, No. 79-2747 at 20.

80. *Id.*

81. Moreover, the judgment of the court of appeals is highly dubious. In *Lee-Hy Paving Corp. v. O'Connor*, 439 U. S. 1034 (1978), Justice Powell, in dissent from a denial of *certiorari*, noted that "[i]t is routine procedure for the judge and jury to view the scene of the accident, often more than once. Jurors drawn from the venue of the accident may be better able to understand testimony pertaining to local conditions and geography." *Id.* at 1037 (Powell, J., dissenting) (footnote omitted). Justice Powell described this factor as "traditionally considered under the doctrine of *forum non conveniens* . . ." *Id.* at 1036 (Powell, J., dissenting).

this element as one of several elements he was required to evaluate in reaching his decision. Thus the district court fulfilled its obligations to conduct the analysis required by *Gilbert*. The criticism of the court of appeals amounts to no more than a difference of opinion.

The court of appeals did not establish that the district court applied incorrect principles, nor did it establish outrageous application of otherwise valid authority. Thus the decision below conflicts with the decisions of this Court.

The decision below represents a significant modification of the respective roles of the district courts and courts of appeals. It allows, in effect, for consideration *de novo* in a court of appeals of a matter hitherto entrusted to the discretion of a district court. This important question should be resolved by this Court.

IV. The Decision Below Conflicts With the Decision of Another Court of Appeals Respecting Whether a Party Must Identify Witnesses and the Substance of Their Testimony in Order for the Factor of Convenience of Witnesses to Be Weighed in Favor of Its Motion to Dismiss an Action on Grounds of *Forum Non Conveniens*, and Presents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The court below held that the factor of convenience of witnesses cannot be weighed in favor of the *forum non conveniens* motion of a party that fails to identify those witnesses and indicate the substance of their testimony.[82]

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82. *Reyno v. Piper Aircraft Co.*, No. 79-2747 at 16. This holding is based on the court's view that the rule for transfer pursuant to 28 U. S. C. § 1404(a) (1976) is applicable in the *forum non conveniens* context. *Reyno v. Piper Aircraft Co.*, No. 79-2747, at 16.

That determination directly conflicts with the decision of the Court of Appeals for the Second Circuit in *Fitzgerald v. Texaco, Inc.*[83] It also is in apparent conflict with other Second Circuit decisions in which a *forum non conveniens* dismissal was affirmed despite no indication that the identity or testimony of witnesses had been specified.[84]

The instant portion of the decision is an aberration. Petitioner's counsel located no reported decision which supports the Third Circuit's requirement. Moreover, a decision rendered [85] two weeks after this case by the same circuit, involving the same issues and similar facts, made no mention of the requirement.[86]

Moreover, the *Reyno* rule will have grievous consequences for the doctrine of *forum non conveniens.* It should not be overlooked that a motion for dismissal on grounds of *forum non conveniens* must be timely made. An unyielding requirement that a party seeking a *forum non conveniens* dismissal must first conduct successful discovery as to witnesses without benefit of compulsory process destroys the vitality of the doctrine itself. Indeed, availability of *forum non conveniens* would be destroyed in every similar foreign-based situation, except the rare case where defendant conducted, or could conduct, discovery and investigation extensive enough to identify witnesses and the subjects of their testimony.

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83. *Fitzgerald, supra* n. 26, at 451 n. 3.

84. *Farmanfarmaian, supra* n. 48, at 924; *Garis v. Compania Maritima San Basilio, S. A.*, 386 F. 2d 155 (2d Cir. 1967).

85. *Dahl v. United Technologies Corp., supra* n. 25.

86. *Id.* The strikingly similar affidavits filed by Hartzell herein and by defendant in *Dahl,* which yielded such strikingly dissimilar results, are printed *infra* at A75-89.

The impact of this decision on the vitality of *forum non conveniens* is clear. Further, the *Reyno* requirement constitutes the sort of departure from established practice and precedent which should not stand unless sanctioned by this Court.

CONCLUSION

Hartzell Propeller, Inc. respectfully prays the Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Appendix.

Opinion of the United States Court of Appeals for the Third Circuit, Gaynell Reyno, as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, Appellant v. Piper Aircraft Company, a Corporation; Avco Lycoming Engine Group, a Division of Avco Corporation; Hartzell Propeller, Inc., a Corporation, Appellees, No. 79-2747, Filed July 24, 1980.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehily, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott,

Appellant

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLOR, INC., a corporation

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
C. A. No. 77-1159

Argued May 22, 1980
Before: ADAMS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges
(Filed July 24, 1980)

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Opinion of the Court

ADAMS, *Circuit Judge*

This is an appeal from a dismissal of a wrongful death action on grounds of forum non conveniens. The issues include the factors to be considered in such a dismissal, the burden of persuasion on the motion, the scope of the trial judge's discretion, and the application of choice of law rules of California and Pennsylvania.

The event giving rise to this dispute was the crash of a Piper aircraft in Scotland in July 1976. The plane was owned by a Scottish air taxi service, the passengers

and crew of which were Scottish. All persons aboard were killed and no witnesses survived the crash. There are indications, however, that something went wrong with the left engine for which compensatory action by the pilot was impossible, was unnecessarily difficult, or was ineptly handled by the pilot.[1]

Gaynell Reyno, a California resident and personal representative of the estates of various Scottish decedents, sued on their behalf in a California state court. Named as defendants were Piper Aircraft Corp., a Pennsylvania corporation that manufactured the aircraft; Avco Lycoming Engine Group, which produced the engine; and Hartzell Propeller, Inc., an Ohio corporation that built the propeller. The wrongful death action is based on theories of strict liability and negligence.[2]

On motions by Piper and Avco based on diversity of citizenship, the case was removed from the California state court to the federal district court in California. After the removal, Hartzell moved to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the case to the Middle District of Pennsylvania under 28

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1. Determination of these issues by the ultimate factfinder, of course, will be dealt with when the merits of the case are reached.

2. Plaintiff contends that the engine mulfunction itself was the result of a design or manufacturing defect for which Piper is liable. In addition, the following dangerous and defective conditions in the aircraft are alleged: (1) inadequacies associated with the left propeller mechanism that prevented institution of emergency procedures in the event of engine loss; (2) design and manufacture of an aircraft incapable of single engine flight with a "windmilling" propeller; (3) manufacture of an aircraft with improper instruments for maintaining single engine operation; and (4) inaccuracies and omissions in the Aircraft Owners Handbook and flight manuals pertaining to emergency procedures and single engine operating speeds.

U. S. C. § 1404(a).[3] Piper moved to dismiss for failure to state a cause of action or, alternatively, to transfer the case to the Middle District of Pennsylvania and to strike the claim for punitive damages. The action was dismissed as to Avco with the agreement of plaintiff.

The district court in California entered an order (1) granting the motion to quash service of process as to Hartzell on the ground that personal jurisdiction over Hartzell was neither authorized by California law nor in accord with due process; and (2) transferring the case to the Middle District of Pennsylvania pursuant to § 1404(a).

Subsequent to the transfer, Hartzell was validly served with process in Pennsylvania and then moved to dismiss the case on the common law ground of forum non conveniens. Piper filed a similar motion captioned as a request for judgment on the pleadings or summary judgment. Both motions were accompanied by affidavits. On the basis of the affidavits, the trial judge granted the motions to dismiss because of forum non conveniens on condition that defendants submit to personal jurisdiction in Scotland and waive any statute of limitations there. Reyno filed a timely appeal.

In this Court, Reyno raises two major contentions: (1) The judge erred in not holding defendants equitably estopped to assert that Scotland was a more appropriate forum, inasmuch as Piper had maintained in California that Pennsylvania was the most appropriate forum. (2) The trial judge abused his discretion in dismissing the action. Subsidiary, but arguably crucial, to this second point is the claim that the district judge's order was based on a legal error as to whether Scottish or Pennsylvania law applied to most or all of the case.

3. That section provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

I. THE INTERACTION OF A TRANSFER UNDER § 1404(a), A SUBSEQUENT FORUM NON CONVENIENS MOTION, AND THE CONCEPT OF PRECLUSION

Reyno argues that the district court erred in not considering whether the defendants were equitably estopped from moving to dismiss. Essentially, she contends that, by following a successful motion to transfer the case from California to Pennsylvania with a motion to dismiss so that the case would have to be filed in Scotland, the defendants are trifling with the court and wasting judicial and litigant time and resources.

The district court's opinion did, however, consider plaintiff's argument and rejected it, albeit in a somewhat summary fashion:

> No cases are cited in support of that proposition and we believe that is a sufficient indicator of the merit of that argument. . . . The papers filed concerning the motion to transfer are, of course, irrelevant to the question we have decided. They were filed early on in this proceeding before many of the important facts of this case were uncovered. Also, Defendants should not be punished for their failure to file a motion to dismiss for forum non conveniens first, instead of the motion to transfer. If they would have filed such a motion we feel sure that the California district court would have likewise dismissed this action.[4]

The Court of Appeals for the Fifth Circuit has reversed the dismissal of an admiralty claim on forum non conveniens grounds for the reasons now pressed by Reyno. It declared that the defendant should not be permitted, after securing a statutory transfer from Louisiana to Georgia, to contend that Georgia was not really

4. 479 F. Supp. at 738.

an appropriate forum; the defendant "may not 'so trifle with the judicial process.'" [5]

Defendants here urge, and the district court seemed to accept, that they did not take inconsistent positions before the district court in California and that in Pennsylvania. The motion in California, defendants argue, simply represented that Pennsylvania was a better forum than California, whereas the present motion contends that Scotland is better yet. Furthermore, they aver, any inconsistencies are a result of fuller knowledge of the relevant facts.

Examination of the motions made by defendants in California reveals that their prior allegations are indeed at variance with their present contentions. A statutory transfer, as well as a common law dismissal, must be shown to be not only more convenient, but also in the interest of justice. In meeting that burden, Hartzell asserted in California that "the plaintiffs would easily have their interests herein protected and adjudicated by application to the courts located in the State of Pennsylvania, and in fact such would be overwhelmingly fair to all the parties herein." [6] Similarly, Piper argued that "[t]he propriety of transferring the within action to Pennsylvania for the convenience of the witnesses appears to overwhelm other factors, in view of the apparent theories of liability as against the defendants." [7]

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5. Insurance Co. of North America v. Ozean/Stinnes-Linien, 367 F. 2d 224, 227 (5th Cir. 1966) (quoting Livesay Ind. v. Livesay Window Co., 202 F. 2d 378, 382 (5th Cir.), *cert. denied*, 346 U. S. 855 (1953)).

6. Hartzell's Memorandum of Points and Authorities in Support of Motion to Dismiss for Lack of Jurisdiction over the Person or for Transfer under 28 U. S. C. § 1404(a) at 8. No. CV-77-3181-IH (C. D. Cal., filed Oct. 11, 1977).

7. Piper's Memorandum of Points and Authorities in Support of Motion to Transfer under 28 U. S. C. § 1404(a) at 6. No. CV-77-3181-IH (C. D. Cal., filed Nov. 23, 1977).

Both defendants averred that, because the claim was based on strict liability, virtually all the evidence and material witnesses as to product and design would be in Pennsylvania or Ohio.[8] Furthermore, they argue that new facts bearing on forum non conveniens were discovered after motions were filed in California.

At the time of the transfer motion all facts now alleged to be relevant—*e.g.*, where various witness are, where the crash occurred, where the wreckage was located, and who owned the plane—were known. All that seems new was that a British administrative agency would investigate and report on the accident and that the decedents' estates would institute a separate action against the air taxi service in Scotland. Although these last facts are indeed relevant to a forum non conveniens motion, they are hardly surprising or significantly new. What defendants really are arguing is that the case was not thoroughly researched before making the transfer motion.

Nevertheless, two factors weigh against an absolute preclusion to raise a forum non conveniens motion in this case: (1) The thrust of Hartzell's motion in the California court, and the contention accepted by that tribunal, was lack of personal jurisdiction. Arguably, then, it is not fair to make Hartzell responsible for proceedings there, even if it would be fair and proper as against Piper.

8. Hartzell stated in its memorandum that "the records and employees of the . . . defendants herein are prospective evidence and witnesses; respectively." Piper asserted, "Necessarily, it would seem that all material witnesses on the liability issues reside in either Pennsylvania or Ohio." In reply to plaintiff's opposition to the transfer, Piper argued that the respective employees of Piper . . . and Hartzell Propeller, who were involved in the design, manufacture, testing, and assembly of the component parts in question, will be material witnesses, but they are located in Pennsylvania and Ohio. It is clear that the convenience of these witnesses is better served if the within action is pending in the State of Pennsylvania than if it is pending in the Central District of California."

(2) Forum non conveniens entails important considerations of public interest, in addition to those of the private litigants themselves. If defendants are correct in their assertion that trial in Pennsylvania would be unduly burdensome to the court and the juror community, it might be self-defeating to raise an absolute barrier to pleading forum non conveniens. Hence, although a party who moves for transfer under § 1404(a) will not be automatically estopped to assert forum non conveniens after a transfer is accomplished, the fact that a party previously succeeded in a statutory transfer ought to be weighed against dismissing for forum non conveniens and as adding to a defendant's already substantial burden on the later motion.

II. Forum Non Conveniens Dismissal

The doctrine that an otherwise validly brought claim may be dismissed because the forum chosen was inconvenient for trial had its origin in the common law of Scotland,[9] became part of the common law of many states,[10] and has a long history of use in federal admiralty actions.[11] It was introduced into federal diversity juris-

9. Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 909-11 (1947). The issue of inconvenient forum as a question on the merits rather than of jurisdiction may be traced at least to 1845. See *id.* at 909 (citing M'Morine v. Cowie, 7 Dunl. 270 (1845)).

10. *See* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1 (1929); Braucher, *supra* note 9, at 911-12.

11. The doctrine in admiralty is thought to derive from dictum in Mason v. The Ship Blaireau, 6 U. S. 143, 157, 2 Cranch 240, 264 (1804). *See* Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L. Rev. 12, 12 & n. 10 (1949); Braucher, *supra* note 9, at 920 & n. 79. *But cf.* Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 505 n. 4 ("The doctrine did not originate in federal but in state courts.").

diction by *Gulf Oil Corp. v. Gilbert*[12] and *Koster v. (American) Lumbermens Mutual Casualty Co.*,[13] decided in 1974.

Simple in enunciation but complex in application, the principle of the doctrine is "that a court may resist imposition upon its jurisdiction even when" neither jurisdiction nor venue is defective.[14] Forum non conveniens as a common law doctrine has been dormant for purposes of interstate dismissals within the federal system since the passage of 28 U. S. C. § 1404(a) soon after the two seminal Supreme Court cases.[15] That statute is similar to the common law doctrine, but authorizes transfers within the federal court system with a lesser burden—both substantively and procedurally—than a motion to dismiss.[16]

The question whether federal or state law of forum non conveniens applies in a diversity case was left open by the Supreme Court and has not definitively been decided by any court of appeals.[17] In this case, as in many

12. 330 U. S. 501 (1947).

13. 330 U. S. 518 (1947).

14. Gulf Oil Corp. v. Gilbert, 330 U. S. at 507.

15. 62 Stat. 937 (1948) (codified at 28 U. S. C. § 1404).

16. The statute is a revision rather than just a codification of forum non conveniens. It permits federal courts to grant transfers on a lesser showing of inconvenience than is required under the common law doctrine and there is no need for pleadings or documents to be refiled in the transferee court. The relevant factors to be considered, however, are the same. Norwood v. Kirkpatrick, 349 U. S. 29, 32 (1955).

17. The Erie question was a matter in controversy in both *Gilbert* and *Koster* until the cases reached the Supreme Court. In *Gilbert* the district court, relying on Weiss v. Routh, 149 F. 2d 193 (2d Cir. 1945), held New York law to apply and dismissed the action. 62 F. Supp. 291, 294 (S. D. N. Y. 1945). The Court of Appeals distinguished *Weiss*, held that federal law controlled, and reversed the trial judge for abuse of discretion. 153 F. 2d 883, 886

17. (Cont'd.)
(2d Cir. 1946). A separate panel deciding *Koster* also applied federal law, but cautiously noted that the result would have been the same under state law. 153 F. 2d 888, 890 n. 2 (2d Cir. 1946). In considering the merits of the dismissal, the Supreme Court relied exclusively on Supreme Court cases, but then avoided discussion of the *Erie* problem with the following:

> The law of New York as to the discretion of a court to apply the doctrine of *forum non conveniens*, and as to the standards that guide discretion is, so far as here involved, the same as the federal rule. . . . It would not be profitable, therefore, to pursue inquiry as to the source from which our rule must flow.

330 U. S. at 509 (citations to New York cases omitted). In *Koster* the Court was equally inscrutable. *See* 330 U. S. at 529 ("Since this case is pending in New York and is a diversity case, it is appropriate to observe that the law of New York, if applicable, is to the same effect as to the considerations to govern forum non conveniens questions in this class of cases.")

The Court's decision not to decide was sharply criticized by Professor Braucher who observed that it

> seems to have been arrived at by something like main force: in the *Koster* case it was contrary to the unanimous view of the circuit judges [that federal law applied], and in the *Gilbert* case it was reached only by ignoring the state court decision most nearly in point, which had been cited with approval by the New York Court of Appeals. Since the circuit court of appeals had not regarded the New York law as controlling, previous decisions suggest that if New York law were held to govern, the normal practice of the Supreme Court would be to remit the case to the lower court to determine that law.[123]

123. Wertheim v. Clergue, 53 App. Div. 122, 65 N. Y. Supp. 750 (1st Dep't 1900); *see* Gregonis v. Philadelphia & R. C. & I. Co., 235 N. Y. 152, 139 N. E. 223, 225 (1923). The *Wertheim* case reversed dismissal of an action based upon false representations in the inducement and performance of a contract on the ground there was no discretion in "cases arising out of commercial transactions and affecting property." 53 App. Div. at 126, 65 N. Y. Supp. at 753. The Supreme Court relied on

brought before the federal courts, federal law has been argued at all stages in the litigation.[18] Upon specific request for supplementary briefing in this Court, all three parties agree that if a choice is necessary, federal law should be followed, and cite numerous district court opinions and commentaries in support of that position.[19]

17. (Cont'd.)
New York cases containing general statements that there is discretion to dismiss tort actions.

Braucher, *supra* note 9, at 928 (footnotes 122 and 124 omitted).

Since the *Gilbert* and *Koster* cases, the Second Circuit has altered its position to indicate that the Erie question is an open one. *See* Thomson v. Palmieri, 355 F. 2d 64, 66-67 (2d Cir. 1966).

18. *See* Founding Church of Scientology v. Verlag, 536 F. 2d 429, 434 n. 13 (D. C. Cir. 1976) ("Although the issue has never been squarely addressed by this Court, federal courts in the District [of Columbia] have in practice used the federal law of *forum non conveniens.*")

19. A footnote in *Koster* addressing the question whether federal courts have discretion to decline granted jurisdiction strongly points, along with the structure of the Court's reasoning in both *Gilbert* and *Koster,* toward use of federal rather than state law.

> Some of our cases appear to hold broadly that the federal courts must exercise their jurisdiction when they have it. [citing cases]. But this is not a case in which it is urged that a state statute restricting remedy to state proceedings defeats federal diversity jurisdiciton, as [those cases] were . . . . In those cases, the Court held that when a state recognizes a cause of action, suit may be brought on it in federal court if diversity jurisdiction is established. That holding has nothing to do with this case. *We are concerned here with the autonomous administration of the federal courts in the discharge of their own judicial duties, subject of course to the control of Congress.*

330 U. S. at 520 n. 1 (emphasis added). Moreover, in Parsons v. Chesapeake & O. R. Co., 375 U. S. 71, 73 (1963), which was not a diversity case, the Court held that "a prior state court dismissal on

They assert, nevertheless, that it is probably not necessary to decide between federal and state law because the cases dealing with forum non conveniens in both California and Pennsylvania have mirrored federal law in all essential respects. We agree.[20]

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19. (Cont'd.)
the ground of forum non conveniens can never serve to divest a federal district judge of the discretionary power [to transfer a case under § 1404(a)]." Virtually all the district courts and commentators that have squarely faced the issue have decided to apply federal law. *See, e.g.*, Poe v. Marquett Cement Manuf. Co., 376 F. Supp. 1054, 1057-59 (D. Md. 1974); Lapides v. Doner, 248 F. Supp. 883, 885-94 (E. D. Mich. 1965); Shulman v. Compagnie Generale Transatlantique, 152 F. Supp. 833, 834-36 (S. D. N. Y. 1957); 1A (pt. 2) Moore's Federal Practice ¶ 0.317[2], at 3232-33 (2d ed. 1978); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3828, at 181 & n. 19 (1976).

20. Opinions of the Pennsylvania Supreme Court have adopted almost verbatim the factors to be considered that are set out in *Gilbert's* and *Koster*, scope of trial court discretion, and standard of appellate review. *See* Rini v. N. Y. Central R. Co., 429 Pa. 235, 240 A. 2d 372 (1968); Plum v. Tampax, Inc., 399 Pa. 553, 160 A. 2d 549 (1960). The section of the Restatement regarding forum non conveniens, on which the Pennsylvania courts also rely, in turn relies on the major federal cases. *See* Restatement (2d) Conflict of Laws § 84 note (1971). California's forum non conveniens doctrine, formerly of common law origin, is now statutorily codified at Cal. Civ. Proc. Code § 410.30. Archibald v. Cinerama Hotels, 15 Cal. 3d 853, 858, 544 P. 2d 947, 950, 126 Cal. Rptr. 811, 814 (1976). California law precludes, except in extra ordinary cases, a trial court from dismissing on forum non conveniens grounds an action brought, as in this case, by a California resident. *Id.* at 859, 126, 544 P. 2d at 950, Cal. Rptr. at 814. An exception to this limitation is made where, also as here, a California resident sues in a representative capacity for foreign beneficiaries. *See id.* at 860 & n. 6, 544 P. 2d at 951 & n. 6, 126 Cal. Rptr. at 815 & n. 6. In all respects relevant to this case, then, we find no dissimilarities in the factors considered under federal and California law. *Cf.* Jagger v. Superior Court, 96 Cal. App. 3d 579, 585-87, 158 Cal. Rptr. 163, 166 (1979)

A. *Comparative Burdens, Trial Court Discretion, and Standard of Review*

A plaintiff is generally conceded the choice of forum as long as the requirements of personal and subject matter jurisdiction, as well as venue, are satisfied. He should not be deprived of the advantages presumed to come from that choice unless the defendant clearly shows facts that "either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience . . . or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems." [21] A court must balance these private and public interest factors, "[b]ut unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." [22]

The district judge believed that the plaintiff's choice of forum is of diminished significance, and the defendants' burden of showing inconvenience correspondingly less, when the plaintiff—more precisely, the real parties in interest—is foreign or when the forum chosen is not the plaintiff's home ground.[23] Neither of these burden-shifting principles may be found in opinions of the Supreme Court or this Court.

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20. (Cont'd.)
(outlining California law in manner essentially following *Gilbert* and *Koster;* concluding that satisfaction in divorce action between foreign celebrities should be deferred to English courts).

21. *Koster,* 330 U. S. at 524.

22. *Gilbert,* 330 U. S. at 508; *see* Schertenleib v. Fraum, 589 F. 2d 1156, 1164 (2d Cir. 1978) ("We begin by noting that plaintiff chose this forum and defendant resides here. This weighs heavily against dismissal."); Hoffman v. Goberman, 420 F. 2d 423, 426-27 (3d Cir. 1970).

23. 479 F. Supp. at 731.

In support of the proposition that less solicitude is due a foreign plaintiff's choice of forum, the district court relied on a decision of the District Court for the Southern District of New York which stated that a foreign plaintiff's "choice of forum should be given less weight than the choice of an American plaintiff." [24] The court of appeals affirmed the judgment in that case, but disapproved of the district court's characterization of the forum non conveniens doctrine applicable to noncitizens.[25] Indeed, as the Court of Appeals for the Second Circuit has recently held, the citizenship of the plaintiff does not affect the defendant's burden under *Gilbert* and *Koster*. American citizenship of the plaintiff does not increase the defendant's burden, just as foreign citizenship may not lessen it.[26]

The holding by the trial judge that a plaintiff's choice is entitled to less weight when it is not the plaintiff's state of residency is somewhat difficult to follow when, as here, that party has already been forced to cede the "home court advantage" as a result of the defendants' previous motion to transfer the case from California to Pennsylvania.[27] It

24. Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 927 (S. D. N. Y. 1977), *aff'd on other grounds*, 588 F. 2d 880 (2d Cir. 1978).

25. *See* Farmanfarmaian v. Gulf Oil Corp., 588 F. 2d 880, 882 (2d Cir. 1978).

26. Alcoa Steamship Co., Inc. v. M/V Nordic Regent, No. 78-7054, slip op. at 5960-68, 5973 (2d Cir. Feb. 25, 1980) (en banc). The court of appeals en banc thus seems to have overturned without specific mention the panel holding in Olympic Corp. v. Societe Generale, 462 F. 2d 376, 378 (2d Cir. 1972), that the defendant's burden is greater if an American plaintiff is to be relegated to a foreign forum. The *Olympic Corp.* opinion was also relied on by the district court here.

27. Phoenix Canada Oil Co., Ltd. v. Texaco, Inc., 78 F. R. D. 445, 453 (D. Del. 1978). The district court relied on Fitzgerald v. Texaco, Inc., 521 F. 2d 448, 451 (2d Cir. 1975), *cert. denied*, 423

would be the rare situation in which a defendant could complain of being vexed or harassed by defending a lawsuit on his home ground.

Of course, the Supreme Court has stated that "[t]he doctrine [of forum non conveniens] leaves much to the discretion of the court to which plaintiff resorts," but this broad proposition was followed by the explanatory observation that "experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses."[28] The standard of review is one of abuse of discretion,[29] but if the trial court has not held the defendants to their proper burden or has clearly erred in weighing the factors to be considered, the equivalent of an abuse of discretion has been demonstrated. Discretion must be exercised within the applicable standards.[30] The district court's wide discretion may

27. (Cont'd.)
U. S. 1052 (1976), which may have relied too literally on *Koster's* mention of deference to a plaintiff's choice of his home forum in setting forth the defendant's burden of establishing inconvenience. *See* 330 U. S. at 524. It is apparent that the *Koster* court was simply setting forth the proposition that, as between diverse citizens, convenience of a particular forum to one party will almost inevitably mean inconvenience to the other. Given this trade-off, the plaintiff's choice will generally be respected.

28. *Gilbert*, 330 U. S. at 508.

29. DeMateos v. Texaco, Inc., 562 F. 2d 895, 897 (3d Cir. 1977), *cert. denied*, 435 U. S. 904 (1978).

30. *Cf.* Founding Church of Scientology v. Verlag, 536 F. 2d 429, 436 (D. C. Cir. 1976) ("Where, as here, there has been no *weighing* of the relative advantages of each forum but only a consideration of the drawbacks of one, that discretion has been abused."). By way of analogoy, it appears appropriate to note that on appeal from the grant of a preliminary injunction, "The standard of appellate review is simply whether the issuance of the injunction, *in the light of the applicable standard*, constituted an abuse of

not serve the defendants as a burden-shifting device on appeal from an order in their favor.

B. *The Applicable Factors*

The *Gilbert* Court divided the elements to be considered into those affecting the private interests of the litigants and those in which the public has an interest. The former include

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained.[31]

Also relevant is the inability to implead other parties directly involved in the controversy.[32] These various ingredients are weighed to determine the "relative advantages and obstacles to fair trial." [33]

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30. (Cont'd.)

discretion." Doran v. Salem Inn, Inc., 422 U. S. 922, 931-32 (1975) (emphasis added). Thus, an order for a preliminary injunction may be reversed if the trial court "commits an obvious error in applying the law, or makes a serious mistake in considering the proof." A. O. Smith Corp. v. FTC, 530 F. 2d 515, 525 (3d Cir. 1976); *see* Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 357 (3d Cir. 1980).

31. 330 U. S. at 508.

32. *Id.* at 511; Fitzgerald v. Texaco, Inc., 521 F. 2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U. S. 1052 (1976).

33. *Id.* at 508.

Among the public interest factors are problems of creating court congestion and imposing jury duty in litigation centers that are removed from the origin of the controversy, the benefit in a matter of public concern of holding the trial in a place accessible to the locality, and the appropriateness of having the trial in a forum that is familiar with the law governing the case rather than having a court elsewhere untangle foreign law.[34]

We will examine each of these factors to determine whether the defendants met their burden.

C. *Private Interests*

1. *Convenience of Witnesses*

If a dismissal is to be premised on the convenience of witnesses, more than a mere allegation to that effect is required. The rule for a statutory transfer, which is to be more readily granted, is no less applicable to a dismissal for forum non conveniens:

> The party seeking the transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover. The emphasis must be on this showing rather than on numbers. One key witness may outweigh a great number of less important witnesses. If a party has merely made a general allegation that witnesses will be necessary, without identifying them and indicating what their testimony will be the application for transfer will be denied.[35]

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34. *Gilbert*, 330 U S. at 508-09.

35. 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3851, at 270-71 (1976); *see* Marbury-Patillo Construction Co., Inc. v. Bayside Warehouse Co., 490 F. 2d 155, 158 (5th Cir. 1974); Texas Gulf Sulphur Co. v. Ritter, 371 F. 2d 145, 148 (10th Cir. 1967). This rule has wide authority in the district

The district court opinion does not discuss the need for such a showing, but rather merely refers generally to witnesses as to damages and witnesses as to the potential supervening negligence of the Scottish air taxi service, all of whom are in Scotland.[36] Nor do the defendants direct us to any affidavits setting forth the requisite specific information, and our search of the record detects none. The requirement of specificity would seem more acute in this case in view of the fact, mentioned above, that in motions before the district court in California the defendants made the claim, in some sense inconsistent with the position now taken though perhaps more accurate, that all witnesses relevant to strict liability or negligence in manufacturing are in Pennsylvania or Ohio.[37]

At the least, then, the district court did not have sufficient information to weigh the convenience of witnesses, and its conclusion that this factor favored defendants appears to be without the requisite foundation.

One further error in discerning the balance of inconvenience to witnesses deserves mention. The trial judge stated that the convenience of expert witnesses, like that of counsel, "is of small importance." [38] No explanation was given for this assertion,[39] but the theory

35. (Cont'd.)

courts as well. *See, e.g.*, Follansbee Metals Co., Inc., v. John T. Clark & Son of N. H., Inc., 387 F. Supp. 574, 581 (W. D. Pa. 1974); Clay v. Overseas Carrier Corp., 61 F. R. D. 325, 331 (E. D. Pa. 1973); Shulof v. Westinghouse Elec. Corp., 402 F. Supp. 1262, 1264 (S. D. N. Y. 1975).

36. 479 F. Supp. at 732.

37. *See* pp. 5-6 & note 8 *supra*.

38. 479 F. Supp. at 732.

39. The district court cited Car-Freshner Corp. v. Auto Aid Mfg. Corp., 438 F. Supp. 82, 85 (N. D. N. Y. 1977), which simply cites other cases without explaining. The proposition seems to be

seems to be either that expert witnesses are fungible or that their testimony can be introduced effectively by deposition. We agree with the authors of a noted treatise that this view is unsound.[40] In this case, as in many others, the testimony of expert witnesses will be crucial. Finding the most trustworthy and credible experts is not often easy, and the advantages of live testimony are not to be discounted.[41]

B. *Availability of Compulsory Process and Impleader*

The defendants' major factual contention when the case comes to trial will be that the fatal crash at issue was caused not by any manufacturing or design defects, but by pilot error or the negligence of the foreign air taxi service. Inability to implead foreign third-party defendants was argued vigorously here as a problem with a trial in this country, and it has, of course, generally been considered an important consideration favoring a forum non conveniens dismissal.[42] Because there is an action pend-

39. (Cont'd.)
traceable to Nacona Leather Goods Co. v. A. G. Spaudling & Bros., Inc., 159 F. Supp. 269, 270-71 (D. Del. 1958), the judge in that case simply concluded that the inconvenience to plaintiff's expert in one forum was counter-balanced by the inconvenience to defendant's expert of trial in the other forum. It was not that the two were insignificant, but that they cancelled each other out.

40. *See* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3852, at 275 (1976).

41. *Id.; see* Lykes Bros. S. S. Co. v. Sugarman, 272 F. 2d 679, 681 (2d Cir. 1959); Berkshire Int'l Corp. v. Alba-Waldensian, Inc., 352 F. Supp. 831, 834-35 (S. D. N. Y. 1972) (Weinfeld, J.); Medich v. American Oil Co., 177 F. Supp. 682 (E. D. Pa. 1959) (Biggs, J., sitting by designation).

42. *See Gilbert*, 330 U. S. at 511; Fitzgerald v. Texaco, Inc., 521 F. 2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U. S. 1052 (1976).

ing in Scotland by the decedents' estates against the appropriate Scottish defendants, which lawsuit Piper and Hartzell have consented to join as codefendants, defendants argued, and the district court concluded, that it would be unfair and unduly burdensome for them to be subjected to both trials. Although the extra burden is readily apparent, the unfairness is not. The defendants state their point as follows:

> Defendants' inability to join [the Scottish] parties as defendants in this case would seriously prejudice Defendants, through exposure to unnecessary, duplicitous litigation, and inconsistent verdicts. If Defendants are found liable here, they will be forced to file an indemnity or contribution action in Scotland against these parties. In light of the fact that Pennsylvania and Scottish law differ greatly with respect to products liability, Piper faces the substantial possibility, and great prejudice, of being held liable on a products liability theory in this case but being forced to prove negligence in an indemnity or contribution action in Scotland. Even if the same standard of liability is applied in this action and in an indemnity or contribution action in Scotland, Defendants run the substantial risk that different juries will find different facts and, hence, produce inconsistent results.[43]

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43. Brief of Appellee Piper at 22. Hartzell's argument on this point is simply conclusory:

> As is reinforced by the plaintiffs survivors action against the air carrier employing the pilot, the agency owning and maintaining the airplane and the estate of the pilot in Scotland, those parties should be joined as defendants and cannot be joined in the United States but could be joined in the proper Forum.

Brief of Appellee Hartzell at 13.

If the defendants are found liable on strict liability here but must prove negligence against the air carrier to obtain indemnity, that is not unfair, but simply the result reached under the laws of the jurisdictions in which the two companies reside. The air taxi operates exclusively in Scotland and plans its operations and expenses according to Scottish law. Piper and Hartzell reside in strict liability jurisdictions, conduct most of their business in strict liability states, and plan accordingly.

The defendants' risk of inconsistent verdicts would only exist if neither Pennsylvania nor Scotland followed principles of res judicata. Under those principles, any subsequent verdict for plaintiffs would merge with a previous favorable judgment or be barred by a prior judgment against the plaintiffs.[44] Res judicata is clearly applicable in American jurisdictions and we may assume, in the absence of any affidavits or citations of Scottish law to the contrary, that it is followed in Scotland as well.[45]

We therefore conclude that defendants' inability to implead other potentially liable parties would indeed make litigation here more burdensome, but defendants have not shown that it would also be unfair. It is properly a factor in their favor on the motion to dismiss, but it is not as weighty as they contend.

2. *Desirability of Viewing the Premises*

The district court concluded that, to the extent weight was to be assigned this factor, it favored defendants: "Familiarity with the topography around Tulla, Scotland

44. *See generally* Restatement (2d) Judgments §§ 47, 48, 68.1 (Tent. Draft No. 1, March 28, 1973).

45. Defendants submitted affidavits from Scottish counsel only on the following points of Scottish law: (1) choice of law, (2) damages that may be awarded, (3) statutes of limitations, and (4) capacity to sue.

and inspection of the wreckage of the plane would be aided by a trial in the British Isles." [46]

It is unclear whether the trial judge in fact ascribed any significant weight to this element, and still more uncertain is what benefit a lay jury would obtain from observing the wreckage in deciding whether the plane crashed because the engine or propeller were incorrectly manufactured or the pilot was negligent. Furthermore, the topography of Scotland may, to the extent relevant, be readily proved by testimony.

D. *The Public Interest*

The parties in arguing this case, and the trial judge in deciding it, have placed the greatest importance on whether, under the applicable choice of law rules, American or Scottish law would apply to major aspects of the claims. The district court concluded that, for the most part, Pennsylvania law should apply to Piper and Scottish law to Hartzell.[47] Because application of different laws to the different defendants might confuse the jury, and because ascertainment of Scottish law would make the trial more difficult, the necessity of applying foreign law to a portion of the case was considered the "uppermost" factor favoring dismissal.[48]

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46. 479 F. Supp. at 734.

47. The trial court opinion stated:

> Uppermost in our weighing of these public interest factors is that a trial in this forum would be hopelessly complex and confusing for a jury as different laws will apply to different parties. From our review of the applicable choice of law rules, it appears that Pennsylvania law would apply to Defendant Piper and that Scottish law would apply to Defendant Hartzell.

479 F. Supp. at 734.

48. *See id.*

As will be discussed below, we conclude that the district court erred in its choice of law determinations. But even if the district court were correct in its conclusion that a mixture of Scottish and American law would be required, dismissal would not have been justified under this Court's settled principles of forum non conveniens.

1. *The Necessity of Applying Foreign Law*

First, we held in *Hoffman v. Goberman* that "[i]t is settled that the mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the court. The district court was, therefore, in error in basing its action, in part at least, on this ground."[49] Although there may be circumstances in which the application of foreign law would present difficulties sufficient to favor dismissal—because of difficulties of translation or because the foreign law itself has principles unknown to our jurisprudence—we are not faced with such a case here.[50] Negligence principles are well-known on this side of the Atlantic and of course there will be no translation problems in dealing with Scottish law.

Second, if trial here would confuse the jury because a different country's law would apply to each defendant, that confusion would either not be eliminated by a trial in Scotland or would be eliminated only by unacceptable unfairness to the plaintiff. If, as is unlikely, a Scottish

49. 420 F. 2d 423, 427 (3d Cir. 1970) (footnote omitted) (law of Netherlands Antilles involved); *accord* Mobil Tankers Co. v. Mene Grande Oil Co., 363 F. 2d 611, 615 (3d Cir.) (Venezuelan law), *cert. denied*, 385 U. S. 945 (1966); Burt v. Isthmus Dev. Co., 218 F. 2d 353, 357 (5th Cir.), *cert. denied*, 349 U. S. 922 (1955); *see* Founding Church of Scientology v. Verlag, 536 F. 2d 429, 436 (D. C. Cir. 1976) (difficulty in applying German law not sufficient).

50. 420 F. 2d at 427.

court as a "transferee" court would apply the same choice of law rulings as would the court here, it would have an equally difficult problem in applying the laws of different countries to different defendants. Dismissal here would not eliminate the difficulty, but only shift it to a foreign forum.

The district court, though, had the affidavit of Scottish counsel that Scotland's choice of law rule for torts was to apply the law of the place of injury to all facets of the case, and therefore Scotland probably would apply its own law to all claims. Even under the district court's choice of law analysis, requiring a mixture of American and Scottish law, it is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But this Court has held that a dismissal for forum non conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law."[51] Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.

2. *Choice of Law Rules Under* Klaxon *and* Barrack

As a federal court deciding a case premised on diversity jurisdiction, we are required by the *Klaxon* rule[52]

51. De Mateos v. Texaco, Inc., 562 F. 2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U. S. 904 (1978). The point is made by Professor Bickel in terms of fairness to the plaintiff. *See*, Bickel, *supra* note 11, at 28 & n. 68 (because premise of forum non conveniens is existence of jurisdiction, "a case will be retained whenever it is not perfectly clear that plaintiff can recover elsewhere if the facts he alleges are true").

52. Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U. S. 487, 496 (1941).

to apply the conflicts of law rules of the state in which we sit. We are not permitted to fashion our own rules, however more clear or salutory they might seem.[53] Complicating matters here is that, for purposes of this litigation and its choice of law problems, we are in effect "sitting" in two different states. Moreover, though not entirely disinterested, each state is in the position of choosing between the laws of two other states.

The action against Piper was transferred under § 1404(a) from California to Pennsylvania. The law of the transferor forum—*i.e.*, California's choice of law rules —should therefore, under *Van Dusen v. Barrack*,[54] be applied as to Piper.

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53. The Supreme Court reaffirmed *Klaxon* in strong terms in Day & Zimmermann, Inc. v. Challoner, 423 U. S. 3, 4 (1975) (per curiam) (reversing appellate court determination that, as a matter of federal choice of law, a federal court could not apply the choice of law rule of the state in which it sat if that jurisdiction had no policy interest in the case). Thus the Court has, at least for now, answered scholarly criticism of *Klaxon* and exhortations that it be overruled. *See, e.g.*, Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1, 32-42 (1963); Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U. C. L. A. L. Rev. 1191 (1967); *cf.* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 713-18 (2d ed. 1973) (making point by rhetorical questions).

54. 376 U. S. 612 (1964). The *Barrack* rule—that a transfer should work no change in the applicable law—is a "general" one, the Court added this qualifier:

> [W]e do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404 (a) or if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens* . . . .

Hartzell's situation is more complex. The California district court ruled that personal jurisdiction over Hartzell was lacking, both under California law and the Due Process Clause. The court did not dismiss the case against Hartzel, but rather quashed service of process and ordered transfer to Pennsylvania along with co-defendant Piper. Although this Court has held that transfer under § 1404(a) is proper even though the transferor state lacked personal jurisdiction,[55] that does not

54. (Cont'd.)

Id. at 639-40 (footnote omitted). Piper does contend that a California court would have dismissed this action on the ground of forum non conveniens. This is implicit in its argument that we should now dismiss the case on that ground and that California law on this issue is the same as the federal law on which the issue has generally been argued. Both Piper and Reyno agree, however, that California's choice of law rules govern the case as to Piper. To follow the Court's caveat would, moreover, be inefficient and wasteful of judicial resources, for it would require the transferee court, after the transferor court had granted a 1404(a) transfer, to examine the transferor State's law to ascertain whether the defendant should have brought a motion to dismiss rather than to transfer in the first place. *See In re* Air Crash Disaster at Boston, Massachusetts on July 31, 1973, 399 F. Supp. 1106, 1121-22 (D. Mass. 1975).

55. In Goldlawr, Inc. v. Heiman, 369 U. S. 463, 466 (1962), the Supreme Court held that transfer for improper venue under 28 U. S. C. § 1406(a) was proper whether or not the court in which the motion was filed had personal jurisdiction over the defendants. *Cf.* Martin v. Stokes, No. 78-3390, slip op. at 5-6 (6th Cir. filed June 19, 1980) ("following a transfer under § 1406(a), the transferee district court should apply its own state law rather than the state law of the transferor district court") (citing cases). This Court applied *Goldlawr* by analogy to § 1404(a) and held that if lack of both venue and personal jurisdiction could not defeat a transfer, then want of the latter alone could not. United States v. Berkowitz, 328 F. 2d 358, 361 (3d Cir.), *cert. denied*, 379 U. S. 821 (1964).

resolve the problem whether the *Klaxon* and *Barrack* rules would still require us to apply the choice of laws rule of the transferor state.

To state the problem is, we believe, to explain why California's law may not apply to Hartzell: if California's exercise of jurisdiction would violate due process, so would application of that state's choice of law rules.[56] Furthermore, *Barrack* is not so rigid. The Court there stated as a *general* rule of statutory construction of § 1404(a) that, to be "in the interest of justice," a transfer should not work a change in the applicable law.[57] We conclude that this case comes within an exception, the possibility of which it was noted in *Barrack*,[58] to the application of the transferor state's law. As with any other statute, we must construe § 1404(a) to avoid any consti-

56. *See* Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of law*, 62 Cornell L. Rev. 94, 103 (1976) (forum must have reasonable due process basis for applying own law, which does not exist if party opposing application of forum's law has no minimum contacts with forum, the transaction giving rise to the claim is not connected with the forum, or application of the forum's law would otherwise be manifestly unfair).

57. The plaintiff in the *Barrack* case challenged, by writ of mandamus, the district court's order transferring the case from Pennsylvania to Massachusetts. He contended that the transfer could not be, as § 1404(a) requires, "in the interest of justice," because it was likely to be accompanied by a prejudicial change in the state law to be applied. 376 U. S. at 626. The district court had held that transfer could be ordered regardless of the possibility of a change in law, *id.* at 626-27, our Court agreed with the plaintiff that it could not, *see* Barrack v. Van Dusen, 309 F. 2d 953 (3d Cir. 1963), and the Supreme Court, disagreeing with both the trial and appellate courts, reversed. A transfer would not be unfair, it held, because "[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms." 376 U. S. at 639.

58. *See* note 54 *supra*.

tutional problem,[59] and so hold that when there has been an interestate transfer without personal jurisdiction, the transferor state's choice of law does not apply to that defendant. Because Pennsylvania does have personal jurisdiction, it is that state in which the federal court is located for the *Klaxon* purpose of finding the choice of law rules governing the case as to Hartzell.

Our analysis so far does not differ from that of the district court, which held that California's choice of law rules applied to Piper and Pennsylvania's rules applied to Hartzell.[60] The court went on to hold that under California's governmental interest approach the Scottish law of wrongful death would apply to make Reyno an improper litigant, but Pennsylvania's law of strict liability rather than Scotland's negligence law would govern the theory of the tort.[61] Pennsylvania's significant contacts approach was thought to require that Scottish law apply to all facets of the claim against Hartzell.[62] We must examine these rulings to determine whether they are erroneous as a matter of law.

a. *California Conflicts Law Applied to Piper*

California was a pioneering state in the governmental interest analysis approach to choice of law that was de-

59. *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U. S. 490, 507 (1979).

60. 479 F. Supp. at 734.

61. The district court relied primarily on Reich v. Purcell, 67 Cal. 2d 551, 432 P. 2d 727, 63 Cal. Rptr. 31 (1967); and Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P. 2d 666, 114 Cal. Rptr. 106 (1974), while mentioning in passing Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P. 2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U. S. 859 (1976), 479 F. Supp. at 735-36.

62. *See* 479 F. Supp. at 736-37 (relying on Griffith v. United Airlines, 416 Pa. 1, 203 A. 2d 796 (1964); and Lewis v. Chemetron, 448 F. Supp. 211 (W. D. Pa. 1978)).

veloped by Professor Currie.[63] In *Reich v. Purcell*,[64] the California Supreme Court abandoned the traditional view that the law of the place of wrong (injury) must be applied in tort actions regardless of the issues, and established in its stead the principle that "[t]he forum must search to find the proper law to apply based upon the interests of the litigants and the involved states."[65]

Also integral to the holding in *Reich v. Purcell* was the introduction into California law of the concept of "false conflicts."[66] In *Reich*, the wrongful death action arose from an automobile accident that occurred in Missouri between an Ohio plaintiff and a California defendant. Missouri, the state of injury, limited compensation for wrongful death, but neither California nor Ohio had any limitation. The California Supreme Court held that as to the issue of the extent of damages, as opposed to the standard of conduct on which liability was based, there was no true conflict in governmental interests. Since California had no limitation on damages, it had no

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63. Professor Brainerd Currie is generally considered to be the father of modern governmental interest analysis. *See* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P. 2d 719, 722, 128 Cal. Rptr. 215, 218, *cert. denied*, 429 U. S. 859 (1976); Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 Vand. L. Rev. 717, 720 (1980); Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 Mich. L. Rev. 392, 392-93 (1980). Most of his writing on the subject is collected in B. Currie, Selected Essays on the Conflict of Laws (1963).

64. 67 Cal. 2d 551, 432 P. 2d 727, 63 Cal. Rptr. 31 (1967).

65. 67 Cal. 2d 553, 432 P. 2d at 729, 63 Cal. Rptr. at 33.

66. The term was not explicitly used in that case, but the methodology was. *See id.* at 555-56, 432 P. 2d at 730-31, 63 Cal. Rptr. at 34-35, Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P. 2d 719, 722, 128 Cal. Rptr. 215, 218, *cert. denied*, 429 U. S. 859 (1976).

interest in protecting its resident defendant from a higher recovery. Moreover, the defendant's California insurance policy would be calibrated to the potential burdens of larger claims. Missouri had an interest in the standard of conduct for behavior within its borders, but its interest in limiting damages was solely to protect in-state defendants. It had no substantial interest in extending that protection to defendants from states with no such limitations, and Ohio, as the state where the decedents' estates were probated, did have a substantial interest in unlimited recovery. Therefore, Ohio's law as to the damages issue was applied.[67]

Subsequent cases indicate a further refinement of the governmental interest and false conflict methodology termed a "comparative impairment" approach.[68] This approach comes into practice only after a "'preliminary analysis has identified a true conflict of the government interests involved.'" Once this preliminary step is satisfied, the court resolves a true conflict by "'determin[ing] which state's interest would be more impaired if its policy were subordinated to the policy of the other state . . . . [T]rue conflicts should be resolved by applying the law of the

67. Reich v. Purcell, 67 Cal. 2d 551, 432 P. 2d 727, 731, 63 Cal. Rptr. 31, 35 (1967), *see* Hurtado v. Superior Court, 11 Cal. 3d 574, 581-83, 522 P. 2d 666, 670-71, 114 Cal. Rptr. 106, 110-11 (1974) (false conflict between plaintiffs' state's limitation of damages and defendant's state's allowance of full recovery; full recovery allowed). The false conflicts methodology is also attributable to Professor Currie, as well as Professor Cavers, *see* B. Currie, *supra* note 62, at 189; D. Cavers, The Choice-of-Law Process 89-90 (1965), both of whom are extensively cited in *Hurtado*.

68. Offshore Rental Co., Inc. v. Continental Oil Co., 22 Cal. 3d 157, 165-66, 583 P. 2d 721, 726, 148 Cal. Rptr. 867, 872 (1978); Bernhard v. Harrah's Club, 16 Cal. 3d at 321, 546 P. 2d at 723-24, 128 Cal. Rptr. at 219-20 (1976).

state whose interest would be the more impaired if its law were not applied.' " [69]

Among the relevant factors to be considered in determining choice of law under California's comparative impairment approach are the following:

(1) The status of the law—whether it is to be considered anachronistic or ascendant in the common law jurisdictions. " 'If one of the competing laws is archaic and isolated . . . , it may not unreasonably have to yield to the more prevalent and progressive law, other factors of choice being roughly equal.' " [70]

(2) Insurance and other planning for risks. Parties may be expected to plan their activities with insurance in mind, and that planning may affect the comparative fairness of two competing rules of liability.[71]

As we have mentioned, the district court divided the case against Piper into distinct issues, and ruled that a California court would apply its law as to one and Scottish law as to others. He then employed what conflicts scholars refer to as *depecage,* defined as "the process of applying the rules of different states to determine different issues in the same case." [72] Although the California Supreme Court has not explicitly adopted this method, it is implicit in that

69. Offshore Rental Co., Inc. v. Continental Oil Co., 22 Cal. 3d 157, 165-66, 583 P. 2d 721, 726, 148 Cal. Rptr. 867, 872 (1978) (quoting *Bernhard, supra* note 68).

70. *Id.* (emphasis deleted) (quoting Freund, *Chief Justice Stone and the Conflict of Laws,* 59 Harv. L. Rev. 1210, 1216 (1946)).

71. *Id.* at 167, 583 P. 2d at 734, 148 Cal. Rptr. at 872.

72. Reese, *Depecage: A Common Phenomenon in Choice of Law,* 73 Colum. L. Rev. 58, 75 (1973); *see* Broome v. Antler's Hunting Club, 595 F. 2d 921, 923 (3d Cir. 1979); R. Leflar, American Conflicts Law § 109, at 221-22 (3d ed. 1977).

court's analysis of cases and it is consistent with modern governmental interest analysis to examine comparative governmental interests as to each issue, to the extent the issues are separable and the balance of comparative interests may vary.[73] We shall therefore examine separately the issues identified by the parties and the district court: the standard of liability, damages for wrongful death, and the capacity of the plaintiff to bring a wrongful death suit as a representative.

Any asserted conflict between American strict liability and Scottish negligence law is, we believe, a false one. Two basic policies underly theories of tort liability: deterrence of harm-causing conduct and compensation of persons injured by that conduct. In private tort law, in which civil rather than criminal liability is imposed, the deterrent function is accomplished by compensation of the plaintiff. The choice between holding a manufacturer liable only for negligence and holding it strictly liable for any dangerous products or design is, practically speaking, a matter both of searching for optimal deterrence of harmful conduct and of allocating the costs of injuries either to producers or consumers. A negligence standard is, broadly speaking, more protective of producers, while strict liability is more solicitous of consumers.

The perceived conflict in this case is between Scotland's interest in encouraging industry by protecting manufacturers and making it relatively more difficult for consumers to recover. Pennsylvania, by contrast, in adopting strict liability, has shifted some of the burdens of injuries from consumers to producers. By adopting this policy of increased deterrence, it hopes to make manufacturers more

73. *See* R. Leflar, *supra* note 72, at 222; Reese, *supra* note 72, at 75. The approach is also implicit in the analysis of Professor Cavers, whose work is often cited by the California Supreme Court. *See* D. Cavers, *supra* note 67, at 40-43.

careful in production and design than they would be if held to a negligence standard.[74]

Applying Pennsylvania's strict liability standard to its resident manufacturer would serve that state's interest in the regulation of manufacturing. Scotland's interest in encouraging industry within its borders would not be impaired, however, by applying a stricter standard of care on a foreign corporation which has no industrial operations in Scotland. Furthermore, Scotland would have to interest in *denying* compensation to its residents for the purpose of benefiting a foreign corporation. Finally, imposition of strict liability on Piper cannot be said to be unfair to it. Inasmuch as Pennsylvania, the state in which Piper makes its product, and the vast majority of American jurisdictions in which most of Piper's aircraft

74. In a recent case in which the California Supreme Court adopted comparative negligence into strict liability, the underlying policy of the latter was said to be to shift the cost of injuries from defective products from consumers to manufacturers. But the court emphasized that strict liability is not absolute liability and does not make the manufacturer an insurer of his product's safety. Daly v. General Motors Corp., 20 Cal. 3d 725, 733, 575 P. 2d 1162, 1166, 144 Cal. Rptr. 380, 384 (1978). In addition to spreading the costs of accidents, strict liability is intended to increase a manufacturer's incentive to produce safe products. *See id.* at 737-38, 575 P. 2d at 1169, 144 Cal. Rptr. at 387. *See* Calabresi, *Optimal Deterrence and Accidents*, 84 Yale L. J. 656 (1975) (strict liability better serves goal of optimal deterrence—minimization of accident and prevention costs); Calabresi & Hirschoff *Toward a Test for Strict Liability in Torts*, 81 Yale L. J. 1055, 1074-84 (1972) (shift from negligence to strict liability cannot be explained simply in terms of better distribution of costs: strict liability's appeal is also in greater deterrence of harmful conduct); *cf.* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1121, 1122 (1960) (one argument that has convinced courts is that supplier of goods should be responsible for the harm they cause, regardless of fault).

are sold and fly, have strict liability,[75] that is the legal standard under which it plans its operations.

Pennsylvania's interest in deterring defects in products can be served without impairing any significant interest of Scotland. Application of Scotland's negligence law would only harm resident beneficiaries without any countervailing benefit to its industrial economy. We therefore conclude that, as between Pennsylvania and Scottish law on this issue, a California court would apply Pennsylvania's strict liability standard. Similar considerations would govern any greater restrictions on recovery for wrongful death that Scotland may have.[76]

The district court declined to make any definitive ruling on the issue of plaintiff's capacity to sue because of the paucity of available information for balancing comparative governmental interests. 479 F. Supp. at 735. There was thought to be no need to decide this question, because the court concluded for other reasons

75. *See, e.g.*, Wade, *On Product "Design Defects" and Their Actionability*, 33 Vand. L. Rev. 551, 555 (1980) (major point of controversy in America is no longer whether strict liability should be adopted, but what its precise standards should be).

76. Courts employing governmental interest analysis have not struggled long to determine that a state where plaintiff but not defendant resides has no interest in restricting recovery for wrongful death of its citizens against foreign corporations. *See, e.g.*, Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P. 2d 666, 114 Cal. Rptr. 106 (1974); *Cf.* Rosenthal v. Warren, 475 F. 2d 438 (2d Cir.) (applying New York government interest analysis; New York forum would apply its own unlimited recovery rather than limitation of state of defendant where all tortious conduct occurred), *cert. denied*, 414 U. S. 856 (1973); Kuhne, *Choice of Law in Products Liability*, 60 Calif. L. Rev. 1, 28 (1972) ("Under a governmental-interest approach, [a] proplanitiff tendency will be conceptualized . . . by imputing a greater state interest to recovery law than to those refusing recovery.")

that the action should be dismissed and brought anew in Scotland.[77]

Because we reverse the dismissal, it will be necessary for the trial judge to decide that issue based upon additional information. If it is held that Reyno does not have representative capacity, it will be necessary to allow a substitution of parties so that the decedents' estates can bring the action directly. Such a substitution would not destroy diversity and should be granted in the interests of justice.[78]

Guiding the trial judge's decision should be the requirement of Fed. R.Civ. P. 17(b) that the capacity of an individual to sue in a representative capacity "shall be determined by the law of the state in which the district court is held."[79] In addition to examining the laws of

77. On the choice of law issue as to representative capacity, the court stated: "We . . . only have affidavits from lawyers from Scotland as to what the rules of law are in that country and thus we cannot make . . . any definitive ruling on the purpose of the Scottish law or thereby the choice of law." 479 F. Supp. at 735. It later concluded only that "it appears the law of Scotland would be applied to Defendant Piper with respect to the wrongful death laws. Under this interpretation Plaintiff would not be a proper litigant." *Id.* at 736.

78. Fed. R. Civ. P. 17(a); *see* Field v. Volkswagenwerk AG, No. 79-1710, slip op. at 24-25 (3d Cir. July 10, 1980).

79. Rule 17(b) in full provides:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held,* except [(1) a special rule for partnerships and other unincorporated associations; and (2) bankruptcy receivers].

California and Pennsylvania to determine whether Reyno has representative capacity,[80] the trial court should consider whether the defendants' challenge to the plaintiff's capacity to sue has come too late in the litigation.[81]

b. *Pennsylvania Conflicts Law Applied to Hartzell*

Citing *Griffith v. United Airlines*,[82] the district court applied the "significant contacts" approach to determine

79. (Cont'd.)
(emphasis added); *see* General Heat & Power Co. v. Diversified Mortgage Investors, 552 F. 2d 556, 557 n. 1 (3d Cir. 1977) (suggesting that Rule 17(b) encompasses the state's conflict of law rules under *Klaxon*); Jacobs v. Adams, 601 F. 2d 176, 178-79 (5th Cir. 1979) (applying conflicts of laws rule to determine scope of power or right to bring suit).

80. The court "is held" in California as to Piper and in Pennsylvania as to Hartzell. *See* pp. 24-26 *supra*.

81. Fed. R. Civ. P. 9(a) requires that a party desiring to raise an issue as to "the capacity of any party to sue . . . or the authority of a party to sue . . . in a representative capacity . . . do so by specific negative averment." The federal rules do not make clear when in the stage of a litigation lack of capacity must be averred, but because lack of capacity is a dilatory defense, Professors Wright and Miller state that it "should be raised promptly. Any unreasonable delay may encourage the court to deny the objection on the ground of prejudice." 6 C. Wright & A. Miller, Federal Practice and Procedures § 1542, at 640 (1971) (footnote omitted). *See* 5 *Id.* § 1295, at 397 (objection to party's capacity should be analogized to an affirmative defense and waived if not asserted early in the litigation by motion or responsive pleading). The record reveals that Reyno's capacity was not challenged by Piper until it joined Hartzell's motion to dismiss after the case had been transferred to the Middle District of Pennsylvania. This motion came after Piper had moved to remove the case from a California state court to a federal court, had filed its answer to the complaint, and had successfully moved to transfer the case to the Middle District of Pennsylvania.

82. 416 Pa. 1, 203 A. 2d 796 (1964).

that Scotland's standard of liability, rather than that of Ohio or Pennsylvania, applied to Hartzell.[83] But a close examination of *Griffith* and, more importantly, subsequent elaborations by the Pennsylvania Supreme Court reveals that Pennsylvania's approach to choice of law is quite similar, at least for purposes of this litigation, to that of California. Pennsylvania first looks to identify and thus avoid false conflicts, and then, when a true conflict is present examines and compares the competing governmental interests.

In *Griffith*, the Pennsylvania Supreme Court overturned the old rule that the law of the state of wrong governs all issues in tort actions,[84] but it did not specifically set forth the contours of that rule's replacement. In fact, as the court later indicated, once governmental interests were examined *Griffith* involved a false conflict situation.[85] The state in which an airplane crashed was held to have no interest in enforcing its limitation of damages for wrongful death when neither party was a resident.[86]

The Pennsylvania Supreme Court noted three general approaches competing to replace the old rule: (1) Professor Currie's early emphasis on applying the forum's law when the forum has a legitimate interest in the issue presented;[87] (2) Professor Ehrenzweig's stress on the

83. 479 F. Supp. at 736-37. All three jurisdictions have contacts with or interests in the alleged tort. Scotland is the residence of the decedents and the place of the fatal crash. Hartzell manufactured the allegedly defective propeller in Ohio and it was assembled into the Piper aircraft in Pennsylvania.

84. 416 Pa. at 21-23, 203 A. 2d at 805-06.

85. Kuchinic v. McCrory, 422 Pa. 620, 624 & n. 4, 222 A. 2d 897, 899 n. 4 (1966).

86. *Griffith*, 416 Pa. at 24, 203 A. 2d at 807.

87. *Id.* at 14, 203 A. 2d at 802 (citing Currie, *Comments on* Babcock v. Jacksons, 63 Colum. L. Rev. 1212, 1233 (1963)).

> be determined within the matrix of specific litigation. What should be sought is an analysis of the extent to which one state rather than another has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law.[92]

The latest discussion in *Cipolla v. Shaposka*[93] summarized the approach of the three cases discussed above as calling upon the court to determine which state "has the greater interest in the application of its law to the question now before us." Moreover,

> In determining which state has the greater interest in the application of its law, one method is to see what contacts each state has with the accident, the contacts being relevant only if they relate to the "policies and interests underlying the particular issue before the court." When doing this it must be remembered that a mere counting of contacts is not what is involved. The weight of a particular state's contacts must be measured on a qualitative rather than quantitative scale.[94]

These cases indicate to us that the primary approach of the Pennsylvania Supreme Court in choice of law is governmental interest analysis. Our determination as to whether the Pennsylvania court would apply American strict liability and unlimited recovery for wrongful death, rather than the negligence and damage limitations law of Scotland, therefore follows our prediction of California

92. McSwain v. McSwain, 420 Pa. 86, 94, 215 A. 2d 677, 682 (1966) (citing *Griffith*, as well as California and New York cases).

93. 439 Pa. 563, 565, 267 A. 2d 854, 855 (1970).

94. *Id.* at 566, 267 A. 2d at 856 (quoting *Griffith*, 416 Pa. at 21, 203 A. 2d at 805).

law. Indeed, the district court ruled that American standards of liability would control under governmental interest analysis applied as to California.[95] It is apparent, then, that the district court erred in concluding that foreign law would govern a substantial part of the case, and it is likewise apparent that the choice of law factor weighted heavily in favor of dismissal for forum non conveniens.

E. *Other Elements of Public Interest*

We have held that under the applicable choice of law rules, Pennsylvania and Ohio are the jurisdictions with the greatest policy interest in this dispute. It follows that any other public interest factors that should be considered under the Supreme Court cases of *Gilbert* and *Koster* favor trial in this country rather than Scotland.

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95. There is some difference between California and Pennsylvania, on the one hand, and Ohio on the other as to the standard of proof in strict liability. Ohio has adopted in full Restatement (2d) Torts 402A, subjecting to liability one who sells a product in a defective condition "unreasonably dangerous." *See, e.g.*, Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N. E. 2d 267, 168 (1977) (Syllabus by the Court); *cf.* Anton v. Ford Motor Co., 400 F. Supp. 1270, 1273-76 (S. D. Ohio 1975) (reviewing products liability decisions of the Ohio Supreme Court). Pennsylvania and California have removed the "unreasonableness" requirement as being inconsistent with the policy of strict liability. *See e.g.*, Barker v. Lull Eng. Co., Inc., 20 Cal. 3d 413, 423-27, 573 P. 2d 443, 449-52, 143 Cal. Rptr. 225, 231-34 (1978); Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A. 2d 1020 (1978). Indeed, our Court in interpreting Pennsylvania law has repeatedly held that use in a jury charge of the Restatement 2d's "unreasonably dangerous" language is reversible error. *E.g.*, Matlocks v. Daylin, Inc., 611 F. 2d 30 (3d Cir. 1979); Bailey v. Atlas Powder Co., 602 F. 2d 585 (3d Cir. 1979). Giving separate charges on the Ohio standard for Hartzell and the Pennsylvania standard for Piper need not necessarily confuse the jury.

III. Conclusion

Because the defendants did not meet the burden required of them for a forum non conveniens dismissal, the judgment of the district court will be reversed and the cause remanded for further proceedings consistent with this opinion.

Order Amending Opinion and Amendment to Opinion of the United States Court of Appeals for the Third Circuit, Gaynell Reyno, as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, Appellant v. Piper Aircraft Company, a Corporation; Avco Lycoming Engine Group, a Division of Avco Corporation; Hartzell Propeller, Inc., a Corporation, Appellees No. 79-2747, Filed September 15, 1980.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott,

Appellant

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
C. A. No. 77-1159

Argued May 22, 1980

Before: ADAMS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

ORDER AMENDING OPINION

It is ORDERED that the slip opinion filed July 24, 1980 in the above matter be and is hereby amended as follows:

Page 7, first paragraph should read:

> At the time of the transfer motion, critical facts such as where various witnesses are, where the crash occurred, where the wreckage was located, and who owned the plane, were known. All that seems new was that a British administrative agency would investigate and report on the accident and that the decedents' estates would institute a separate action against the air taxi service in Scotland. Although these last facts are indeed relevant to a forum non conveniens motion, they are hardly surprising or significantly new.

By THE COURT,

ARLIN M. ADAMS
Circuit Judge

Dated: September 15, 1980.

Memorandum of the United States District Court for the Middle District of Pennsylvania, Gaynell Reyno, as Personal Representative of the Estate of William Fehilly; Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, Plaintiffs v. Piper Aircraft Company, a Corporation; Avco Lycoming Engine Group, a Division of Avco Corporation; Hartzell Propeller, Inc., a Corporation, Defendants, Civil Action No. 77-1159, Filed October 19, 1979, 479 F. Supp. 727 (1979).

UNITED STATES DISTRICT COURT
M. D. PENNSYLVANIA

Oct. 19, 1979.

Gaynell REYNO, Personal Representative of William Fehilly, Liam Stuart Fehilly, William James McDougall Storm, David Vincent Moran and Peter Cunningham Scott, Plaintiffs,

v.

PIPER AIRCRAFT COMPANY, a corporation, Avco Lycoming Engine Division, a Division of Avco Corporation, Hartzell Propeller, Inc., a corporation, Defendants.

Civ. A. No. 77-1159.

MEMORANDUM

HERMAN, *District Judge.*

This action arises out of an airplane crash near Tulla, Scotland on July 27, 1976 in which all persons aboard were

killed. The Plaintiff, Gaynell Reyno, instituted this suit as the personal representative of five decedents, William Fehilly, Liam Stuart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott. Gaynell Reyno seeks general damages for the heirs and next of kin of the above decedents and damages for funeral and burial expenses in this suit styled as one for wrongful death on the basis of products liability and negligence theories. The remaining Defendants, Piper Aircraft Company and Hartzell Propeller, Inc., were the manufacturers of the aircraft and propeller respectively. A number of motions are presently before the court, a motion to dismiss filed by Defendant Hartzell Propeller, a motion for judgment on the pleadings or for summary judgment filed by Piper Aircraft, and two motions to strike a responsive brief filed by the Plaintiff. After reviewing the extensive materials submitted by all parties, we have concluded that this action must be dismissed on the ground of *forum non conveniens.* This dismissal will be conditioned on the Defendants abiding by their stipulation to submit to the jurisdiction of the courts of Scotland and their waiver of the Scottish statute of limitations.

Several issues were raised by the motions of the Defendants. Other than their main argument that the action should be dismissed under the doctrine of *forum non conveniens,* the Defendants also asserted that under applicable choice of laws rules that the law of Scotland would control this action and that pursuant to Scottish law, the Plaintiff neither has standing nor a right to proceed under the theory of strict tort liability. This question of the applicable law is interrelated with the analysis for *forum non conveniens* and because of our decision that the Defendants have shown overwhelming reasons for dismissal under this doctrine, we need not directly confront the standing and liability issues. The Plaintiff has also raised the question of estoppel which we have found to be unpersuasive.

Our primary attention therefore is focused on the factors applicable to the doctrine of *forum non conveniens* and the question whether we should exercise jurisdiction over this action brought by reason of an aircraft accident in Scotland, in which Scottish citizens who were passengers and a Scottish pilot, acting in the course of his employment with a Scottish Air Service, were killed while flying in Scottish airspace and when all decedents' survivors, the real parties in interest, are citizens and residents of Scotland and more particularly, when the only contact with Pennsylvania is that it was the site of the manufacture of the airplane involved in this litigation, not the propeller which was manufactured and designed in Ohio, over seven years prior to the date of the fatal accident. Too much has happened from the date the airplane left the plant of Piper Aircraft, which goes to the heart of the question of liability, that the contact with this forum with respect to this action can at best be described as plainly insignificant.

The procedural history of this case is important to our decision of dismissal. The action was instituted by Plaintiff Reyno in the Superior Court of the state of California for the county of Los Angeles in July of 1977. After being removed to federal court in August of that year, Defendant Hartzell filed a motion to dismiss the action for lack of personal jurisdiction or in the alternative to transfer the action pursuant to 28 U. S. C. § 1404(a). Defendant Piper then joined in Defendant Hartzell's motion to transfer the action on November 23, 1977. The District Court entered an order on December 21, 1977 granting Defendant Hartzell's motion to quash service of process and granting the motion to transfer this action to the United States District Court for the Middle District of Pennsylvania. The quashing of service of process to Hartzell was based on due process considerations set forth in *International Shoe Company v. Washington*, 326 U. S. 310, 66

S. Ct. 154, 90, L. Ed. 95 (1945). The court did not dismiss the action against Defendant Hartzell since valid service against it was possible in the Middle District of Pennsylvania. The importance of the transfer of the action and the quashing of service against Hartzell lies in the applicable choice of laws rule that is relevant to each Defendant under rules of *Van Dusen v. Barrack*, 376 U. S. 612, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964) and *Klaxon Co. v. Stentor Electric Manufacturing*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1944).

The facts as noted center on the crash of an aircraft on July 27, 1976 in which the pilot and all passengers were killed in the navigable air space near Tulla, Scotland. The aircraft involved in the accident was a Piper Model TA-23 bearing British registration mark G-AYSF which was manufactured by Defendant Piper at Lock Haven, Pennsylvania. The plane's propeller was designed and manufactured by Defendant Hartzell Propeller, Inc. in Ohio. The aircraft was being piloted at the time of the accident by a Scottish citizen and resident, over mountainous terrain in southern Scotland. Subsequent to the manufacture of the aircraft involved in this accident it was sold and delivered to a purchaser in Ohio for use in the United States. By a chain of events, apparently still unknown to the Defendants, the plane came to be owned and operated by a Scottish air-taxie company in Scotland and the British Isles. The plane was owned, operated, maintained, and serviced by the Scottish owner for several years preceding the accident of July 27, 1976. The British Department of Trade Investigation investigated the accident shortly after its occurrence. Presently, what remains of the wreckage is in the possession of the British Department of Trade Investigation.

The Plaintiff, Gaynell Reyno instituted this action as the personal representative of the estates of five of the de-

cedents. All of these decedents were citizens and residents of the country of Scotland. Also, all heirs and next of kin, and all those persons entitled to recover by virtue of the deaths of the passengers, (if any recovery is decreed), are citizens and residents of the country of Scotland. Plaintiff Reyno is a citizen and resident of California and is not related to the decedents.

The Defendants assert that the accident was due to pilot error or improper maintenance and servicing of the aircraft and in this respect have stated their desire and inability to join the operating company by whom the pilot was employed, the pilot's estate, and the owner and maintainer of the aircraft. A lawsuit has been brought before the courts of Scotland naming as defendants the operating company, MacDonald Aviation, Ltd., the owner of the plane, Air Navigation and Trading Company, Ltd., the executor of the pilot's estate, and the Civil Aviation Authority. Also an action was commenced in the courts of Great Britain against Piper Aircraft and Hartzell Propellers along with McDonald Aviation and Air Navigation and Trading Company by a personal representative of the sixth passenger in the aircraft at the time of the accident, the only passenger not represented by Gaynell Reyno in the instant action. Therefore at least one action is pending before the courts in the United Kingdom against the present Defendants and other involved parties.

We now begin with a discussion of the factors that we believe substantially point to the dismissal of this action under the doctrine of *forum non conveniens*. We have the inherent power to refuse jurisdiction over a case such as this one where the interests of justice require that the suit be brought in a foreign country. *Gulf Oil Corporation v. Gilbert*, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947); *DeMateos v. Texaco, Inc.*, 562 F. 2d 895 (3d Cir. 1977), *cert. denied* 435 U. S. 904, 98 S. Ct. 1449, 55 L. Ed.

2d 494 (1978); *Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448 (2d Cir. 1975) *cert. denied* 423 U. S. 1052, 96 S. Ct. 781, 46 L. Ed. 2d 641 (1976); *Dahl v. United Technologies Corporation*, 472 F. Supp. 696 (D. Del. 1979).

The general factors that, we must consider in determining whether to dismiss an action for *forum non conveniens* were set forth by the Supreme Court in *Gulf Oil Corporation v. Gilbert*, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). Mr. Justice Jackson enumerated in that decision numerous private and public interests that should be considered under the doctrine. The factors pertaining to the private interests of the litigants are the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive" *Id.* at 508, 67 S. Ct. at 843. The public factors bearing on the question include the administrative difficulties flowing from court congestion, an interest in having local controveries decided at home, the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the Court, and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-509, 67 S. Ct. 839.

The above cited factors have generally been followed by all courts presented with the issue of whether a case should be dismissed because a foreign forum is the more convenient one. *See, e.g., DeMateos v. Texaco, Inc.*, 562, F. 2d 895, 899 (3d Cir. 1977); *Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 450-51 (2d Cir. 1975); *J. F. Pritchard and Co. v. Dow Chemical of Canada*, 462 F. 2d 998, 1000 (8th Cir. 1972); *Fitzgerald v. Westland Marine Corporation*,

369 F. 2d 499, 501-02 (2d Cir. 1966); *Dahl v. United Technologies Corporation*, 472 F. Supp. 696, 699 (D. Del. 1979); *Top Form Mills v. Sociedad Nationale Industria*, 428 F. Supp. 1237, 1252-53 (S. D. N. Y. 1977); *Michell v. General Motors Corporation*, 439 F. Supp. 24, 26-27 (N. D. Ohio 1977); *Texaco Trinidad, Inc. v. Astro Exito Navegacion S. A.*, 437 F. Supp. 331, 332 (S. D. N. Y. 1977); *Farmanfarmaian v. Gulf Oil Corporation*, 437 F. Supp. 910, 923 (S. D. N. Y. 1977); *DelRio v. Ballenger Corporation*, 391 F. Supp. 1002, 1004 (D. S. C. 1975); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 814-13 (S. D. N. Y. 1972); *McCarthy v. Canadian National Railways*, 322 F. Supp. 1197, 1199 (D. Mass. 1971); *Olympic Corporation v. Societe Generale*, 333 F. Supp. 121, 123-24 (S. D. N. Y. 1971). We have carefully read each of the above cited decisions and in light of these decisions and their analysis of the Gulf Oil factors, it is clear that it would be no less than an abuse of our discretion if we did not dismiss this action on *forum non conveniens* grounds as the Gulf Oil criteria overwhelmingly point to dismissal.

The first factor that we must consider is whether an alternative forum is open to the Plaintiff if this motion is dismissed. Generally, it has been stated by the courts that the doctrine of *forum non conveniens* presupposes that an alternative more appropriate and convenient forum is available. *See, e.g., DelRio v. Ballenger Corporation*, 391 F. Supp. 1002, 1006 (D. S. C. 1978), *Texaco Trinidad v. Astro Exito Navegacion S. A.* 437 F. Supp. 331, 332 (S. D. N. Y. 1977); *Farmanfarmaian v. Gulf Oil Corporation*, 437 F. Supp. 910, 915 (S. D. N. Y. 1977). This principle is taken from the *Gulf Oil* decision in which it is stated "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process . . . ." *Gulf Oil*, 330 U. S. at 506-07, 67 S. Ct. at 842. In the instant

motion the Defendants have consented to submit to the jurisdiction of the Scottish courts of law and we have noted our intention of conditioning the dismissal of this action on their submission to the jurisdiction of such courts and their waiver of any statute of limitation. Plaintiff has an alternative forum available to her and in fact a case is proceeding in the foreign courts already.

Next, we turn to the important factor of Plaintiff's choice of forum. As stated in *Gulf Oil*, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.* at 508, 67 S. Ct. at 843. Here the Plaintiff's first choice was the California state Superior Court. Plaintiff relies on a number of cases under 28 U. S. C. § 1404(a) in which the Plaintiffs were American citizens. This case, however, does not involve section 1404(a) as the determination rests on our inherent power to dismiss and it also does not involve Americans as real parties in interest. Rather, the Plaintiff is a representative of foreign citizens and residents seeking a forum in the United States because of the more liberal rules concerning products liability law.

Generally, the courts have been less solicitous when the plaintiff is not an American citizen or resident and, particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States. As stated in *Farmanfarmaian v. Gulf Oil Corporation*, 437 F. Supp. 910, 927 (S. D. N. Y. 1977), when a case involves a "claim of a foreign plaintiff, [his] choice of forum should be given less weight than the choice of an American plaintiff . . . ." And in *Olympic Corporation v. Societe Generale*, 462 F. 2d 376, 378 (2d Cir. 1972), the court stressed that the balance of the Gulf Oil factors need not be as strong in favor of defendants when the plaintiff is not an American citizen. *See also, Olympic Corporation v. So-*

ciete Generale, 333 F. Supp. 121, 124 (S. D. N. Y. 1971); *Michell v. General Motors Corporation*, 439 F. Supp. 24 (N. D. Ohio 1977).

Also, the plaintiff's choice of forum is generally given less weight when the forum selected is not the plaintiff's home jurisdiction. *Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 451 (2d Cir. 1975); *McCarthy v. Canadian National Railways*, 322 F. Supp. 1197, 1199 (D. Mass. 1971). In this case the real parties in interest, the heirs and next of kin of William Fehilly, Liam Stuart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Scott, are not American citizens or residents, but rather, citizens and residents of Scotland. Since the real parties in interest are not American citizens, and the forums of either California or the Middle District are not in any way their "home" forum, this factor of plaintiff's choice of forum is entitled to little weight.

The next grouping of factors that we will weigh are the private interests of the litigants, including relative ease of access to sources of proof, availability of compulsory process, cost of obtaining willing witnesses, necessity of a view of the premises, and the site of the investigation of an accident. A review of the facts in this case illustrates that all such private interests point to Scotland as the appropriate forum for this litigation.

Nearly all events relevant to this action occurred outside of the Middle District of Pennsylvania. The only connection with this forum is the fact that the plane was manufactured here over seven years before the accident. The only contact with Plaintiff's choice of forum, California, is that Plaintiff's attorney and expert reside there. Convenience to counsel or to expert witnesses, it should be noted, is of small importance in the balancing of factors. See *Car-Freshner Corporation v. Auto Aid Manufacturing Corporation*, 438 F. Supp. 82, 85 (N. D. N. Y. 1977). The

connections with Scotland are overwhelming. The accident occurred in Scotland, the real parties in interest are citizens of Scotland, the decedents were all citizens of Scotland, the investigation of the accident occurred in Scotland, the aircraft was owned, operated, and maintained by a Scottish company, the pilot was Scottish, the wreckage remains in the possession of the foreign authorities, nearly all witnesses needed for the defense of this suit are located in Scotland, and all witnesses to damages are located in Scotland.

The ease of access to proof element strongly points to dismissal of this action. First, all evidence as to damages, both witnesses and documents, is located in Scotland. Ease of access to sources of proof of damages is an important factor in a wrongful death action. *Domingo v. States Marine Lines,* 340 F. Supp. 811, 815 (S. D. N. Y. 1972). Furthermore, nearly all witnesses necessary for the defense of this suit are located in the British Isles. For example, witnesses regarding the maintenance of the aircraft are in Great Britain, witnesses concerning the training of the pilot are located there, and witnesses relating to the investigation of the accident are in the British Isles. None of these witnesses are subject to compulsory process. Clearly, these witnesses are critical to this case and since they are located in Scotland, it would be more convenient for the witnesses and less costly for the litigants to litigate this matter in Scotland. *See, Fitzgerald v. Texaco, Inc.,* 521 F. 2d 448, 451 (2d Cir. 1975); *Dahl v. United Technologies Corporation,* 472 F. Supp. 696 (D. Del. 1979); *Domingo v. States Marine Lines,* 340 F. Supp. 811, 815 (S. D. N. Y. 1972); *Top Form Mills v. Sociedad Nationale Industria,* 428 F. Supp. 1237, 1253 (S. D. N. Y. 1977); *J. F. Pritchard & Co. v. Dow Chemical of Canada,* 462 F. 2d 998, 1002 (8th Cir. 1972); *DelRio v. Ballenger Corporation,* 391 F. Supp. 1002, 1004 (D. S. C. 1975).

Plaintiff relies on the argument that the essential elements needed for proof of her case are present in this forum since the plane was designed and manufactured here. We note that the alleged defective component part, the propeller, was designed and manufactured outside of this forum. Also the aircraft was manufactured over seven years prior to the accident and evidence of any changes in the plane is located in Scotland. Even Plaintiff admits that all witnesses to damages reside in Scotland. Furthermore, we cannot accept Plaintiff's argument that the evidence going to legitimately raised defenses is irrelevant to our determination. The interests of justice require that a trial be fair to all parties, not just the Plaintiff.

While there are no doubt numerous cases that have reached this same conclusion based on fundamental fairness, we will specifically point to just two. The first case we rely on is *Michell v. General Motors Corporation*, 439 F. Supp. 24 (N. D. Ohio 1977). In *Michell* the court held that mere design and manufacture of an infant seat in Michigan was not crucial in the balancing of factors and it dismissed the suit on *forum non conveniens* grounds where the injury was to Canadian plaintiffs, involved a Canadian accident, when presentation of Canadian witnesses was necessary and could not be guaranteed in the United States. *Id.* at 25-26. All of these factors are present in the instant case and like the *Michell* court, we find the evidence relating to design in this action to be overwhelmed by the evidence needed from Scottish sources.

The second case on point on this question is *Dahl v. United Technologies Corporation*, 472 F. Supp. 696 (D. Del. 1979). *Dahl* was brought in Delaware by the personal representative of four Norwegians who died in a crash of a Norwegian owned and operated helicopter in Norwegian territorial waters against the helicopter manufacturer on the basis of design and manufacture defects. Chief Judge

Latchum discussed the nearly identical factual pattern as we have here in the following manner:

> . . . a substantial amount of the testimonial evidence will come from Norwegians. Testimony from persons who knew the decedents will be relevant to the damages issue. Among the potential liability witnesses are employees of Helikopter Service A/S, employees from other firms in Norway that serviced or made installations on the helicopter, and the Norwegian government officials who investigated the accident.

Id. at 700. We think the chief judge was absolutely correct, that we must look to all evidence that is necessary for a fair trial and in this case the place to find such evidence is Scotland.

Interrelated with the above discussion is the fact that the witnesses and other evidentiary materials that are located in Scotland are beyond the reach of compulsory process of this court. The unavailability of compulsory process to compel the attendance of witnesses necessary for a complete and fair trial has been recognized as a critical factor in the dismissal of cases for *forum non conveniens*. *See e.g., Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 451 (2d Cir. 1975); *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499 (2d Cir. 1966); *Dahl v. United Technologies Corporation*, 472 F. Supp. 696, 700 (D. Del. 1979); *Michell v. General Motors Corporation*, 439 F. Supp. 24, 27 (N. D. Ohio 1977); *Texaco Trinidad, Inc. v. Astro Exito Navegacion S. A.*, 437 F. Supp. 331 (S. D. N. Y. 1977); *DelRio v. Ballenger Corporation*, 391 F. Supp. 1002, 1004 (D. S. C. 1975); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 815 (S. D. N. Y. 1972).

Finally, the absence of necessary third parties weighs heavily on our determination that the Middle District is

not a suitable forum for this litigation. The Defendants have persuasively argued that persons located in Scotland ought to be made parties to this suit. These include the pilot, the owner of the plane, and the operating company. Since the Defendants in this action cannot implead these necessary parties it would be unfair to make Piper and Hartzell proceed to trial in this forum. This inability to implead parties located in foreign countries has likewise been viewed as a critical factor by the courts. *See e.g., Gulf Oil Corporation v. Gilbert,* 330 U. S. 501, 511, 67 S. Ct. 839, 91 L. Ed. 1055 (1946); *Texaco Trinidad, Inc. v. Astro Exito Navegacion S. A.,* 437 F. Supp. 331, 334 (S. D. N. Y. 1977); *Fitzgerald v. Texaco, Inc.,* 521 F. 2d 448, 453 (2d Cir. 1975); *Fitzgerald v. Westland Marine Corporation,* 369 F. 2d 499, 502 (2d Cir. 1966); *Olympic Corporation v. Societe Generale,* 333 F. Supp. 121, 124 (S. D. N. Y. 1971); *Domingo v. States Marine Lines,* 340 F. Supp. 811, 816 (S. D. N. Y. 1972). These potential defendants could be reached in Scotland and in fact they have been joined with the instant Defendants in a suit in the British Isles. Certainly it would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant witnesses.

The last factor that we will discuss pertaining to the private interests is the necessity of a view. More generally, we believe this factor of *Gulf Oil* requires us to consider, as many courts have done, where the accident or event took place. All facts relevant to the crash are in Scotland, other than the fact that the manufacture and design of the plane occurred in the United States seven years before. If weight should be assigned to this "view" criteria, it certainly favors the Defendants. Familiarity with the topography around Tulla, Scotland and inspection of the wreckage of the plane would be aided by a trial in the British Isles where the accident occurred.

We now will look to the factors concerning the public interest which we believe even more strongly point to dismissal. These factors include court congestion, local interest in the lawsuit, court familiarity with the law that will govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the court and the unfairness of burdening citizens in an unrelated forum with jury duty. *Gulf Oil Co. v. Gilbert*, 330 U. S. 501, 507-09, 67 S. Ct. 839, 91 L. Ed. 1055 (1946); *DeMateos v. Texaco, Inc.*, 562 F. 2d 895, 899, n. 2 (3d Cir. 1977); *Michell v. General Motors Corporation*, 439 F. Supp. 24, 27 (N. D. Ohio 1977).

Uppermost in our weighing of these public interest factors is that a trial in this forum would be hopelessly complex and confusing for a jury as different laws will apply to different parties. From our review of the applicable choice of law rules, it appears that Pennsylvania laws would apply to Defendant Piper and that Scottish law would apply to Defendant Hartzell.

The law is clear that we must apply the choice of law rule of the state in which we sit, Pennsylvania. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). However, when a case is transferred pursuant to 28 U. S. C. § 1404(a), we then apply the choice of law rules of the state from which the case was transferred. *Van Dusen v. Barrack*, 376 U. S. 612, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964). Thus in this case we must apply the California choice of law rules to Defendant Piper. In applying the choice of law rules of California we have three choices of law, California, Pennsylvania, and Scottish. With respect to Defendant Hartzell, the applicable law is not as easily arrived at.

Defendant Hartzell as previously noted, was found to have insufficient contact with the state of California

and service was quashed. The District Court of California did not dismiss the action to Defendant Hartzell, but instead properly transferred the action to this forum. We use "properly" in the sense that the court had the power to transfer the action as to Defendant Hartzell even though service was quashed. Plaintiff argues that the *Van Dusen* rule applies to Hartzell as well as Defendant Piper, however, for the reasons that follow, we cannot accept this assertion.

The purpose of the *Van Dusen* rule was to prevent a party from obtaining a change in the law that would be applied to a case by seeking a transfer of the action. In essence, the *Van Dusen* Court ruled that a transfer under section 1404 should result in a change of courtroom only, not a change in the applicable law. In the instant case the district court of California held that the law of California could not apply to Defendant Hartzell because of insufficient contacts with that state. The question we are presented with is whether the Plaintiff in this action can capture the law of California under *Van Dusen* for transportation to this district and have it apply to Defendant Hartzell when service against Defendant Hartzell was improper in California. We hold that Plaintiff cannot accomplish this. Simply, the Plaintiff cannot take advantage of the law of California when she could not properly obtain jurisdiction over Defendant Hartzell there. Thus, to Hartzell we must apply Pennsylvania choice of law rules.

First, we will briefly discuss whether California choice of law rules require that we apply California, Pennsylvania, or Scottish law to Defendant Piper. California courts follow the governmental interest approach in resolving conflict of law issues. *Reich v. Purcell,* 67 Cal. 2d 551, 63 Cal. Rptr. 31, 432 P. 2d 727 (1967); *Hurtado v. Superior Court,* 11 Cal. 3d 574, 114 Cal. Rptr. 106, 522

P. 2d 666 (1974). As Plaintiff states in her brief the "governmental interest approach differs greatly from the significant contacts approach utilized in Pennsylvania." The governmental interest approach, in determining the law applicable in a California forum, applies to situations involving a foreign country and the choice between the two. *Hurtado v. Superior Court*, 11 Cal. 3d 574, 114 Cal. Rptr. 106, 522 P. 2d 666 (1974). The objective of the analysis is to determine the law that most appropriately applies to the issue involved.

The government interest approach involves three steps of analysis. First, the applicable legal issue and law must be identfiied. Second, the state interest underlying the law must be determined. Third, it must then be determined if that interest would be furthered through application [illegible] states' law to resolve the specific issues involved in the case. We intend to make no definitive ruling on what law will apply under the California governmental interest analysis. Rather, our discussion will go only so far as to hold that either Pennsylvania or Scottish law will apply under the California choice of laws rules. We are relegated to this less than complete analysis because of our unfamiliarity with Scottish law which in itself is a factor supportive of dismissal of the action.

Areas of conflict are present between these three jurisdictions, i.e., Pennsylvania, California, and Scotland. First, Scottish law does not allow a personal representative to bring an action of this kind in Scotland. Under Scottish law, a personal representative may only bring an action for funeral expenses. Otherwise, an action of this type may be brought only by the deceased's relatives or dependents. We have previously stated that Gaynell Reyno meets neither of these requirements. Both Pennsylvania and California appear to permit such suits. Second, the law of Scotland has not adopted and does not recognize the

theory of strict products liability. The only basis for liability in Scotland for the manufacturer of a defective product is negligence. In contrast, both Pennsylvania and California recognize strict liability.

What interests of the state these laws promote must be identified by reference to the interpretations of the laws by the respective forum courts. California courts have held that the states' interest in creating a cause of action for wrongful death lies in governing the distribution of proceeds to beneficiaries and also the interest of deterring conduct within its borders that takes life. *Hurtado v. Superior Court*, 11 Cal. 3d 574, 114 Cal. Rptr. 106, 522 P. 2d 666 (1974). For the purposes of this discussion we will assume that similar interests are promoted by the Pennsylvania laws. Since the accident did not occur in either Pennsylvania or California and because none of the decedents were residents of either of these states, it would appear that the application of either Pennsylvania or California law would not further the purpose of the wrongful death laws. If the purpose of the Scottish law, permitting recovery for relatives of decedents, is similar, it would seem that its interests would be furthered by the application of the law of Scotland.

Particularly, this is true with respect to the rule of law in Scotland that only relatives or dependents of a deceased may bring an action of the type of the instant action and not a personal representative unrelated to the decedent. We, however, only have affidavits from lawyers from Scotland as to what the rules of law are in that country and thus we cannot make, as we said before, any definitive ruling on the purpose of the Scottish law or thereby the choice of law. We do agree with the Plaintiff that in line with the California decisions, that the restrictions on recovery that exist in Scotland would generally not be applied in a choice of laws situation as the foreign country

would likely have no interest in restricting any recovery its citizens might receive in foreign courts from foreign defendants. See, *Hurtado v. Superior Court*, 11 Cal. 3d 574, 114 Cal. Rptr. 106, 522 P. 2d 666 (1974). We do not believe the provisions restricting suits of this nature to relatives of the decedents fall within this general principle however. Such a restriction would likely be for the purpose of insuring that suits are brought by persons interested in the action so that competence of counsel and administration of a suit are in the hands of those parties with the ultimate interest.

We therefore return to our previously enunciated conclusion that the law of California would not be applied under the choice of law rules of California as that state has no interest in having its laws apply. Plaintiff admits this fact. Furthermore, we believe that Pennsylvania also has no governmental interest in having its wrongful death laws apply. For the protection of the real parties in interest in this suit we believe that the application of Scottish law would further the purpose of the laws of Scotland with respect to the restrictions on proper plaintiffs. We believe that the California courts would therefore apply the law of Scotland to this suit.

There exists a conflict among the three forums in the law of products liability. Scotland only recognizes negligence as a basis for liability while the two states apply the rule of strict liability. California has no interests in having its products liability law apply and thus under the California choice of law rules it would not apply its own law. See, *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P. 2d 719 (1976); *Reich v. Purcell*, 67 Cal. 2d 551, 63 Cal. Rptr. 31, 432 P. 2d 727 (1967). Our choice is thus between Scottish law and the law of Pennsylvania.

The law of Scotland in not recognizing strict liability is more limited in terms of liability than Pennsylvania. Generally, such a restriction provides an indication that the law seeks to limit the liability of its resident manufacturers to those cases where negligence can be shown; that only culpable conduct will result in liability. If the only purpose of the requirement of proof of negligence is to aid manufacturers in Scotland, then we may assume that the purpose of the law will not be furthered by applying it to American manufacturers.

Pennsylvania's interests in recognizing strict liability is foremost in ensuring that citizens will be compensated for injuries resulting from defective products. There does exist in the imposition of strict liability on manufacturers an element of deterrence. While the element of compensating injured residents outweighs the deterrence factor, at least some slight interest on the part of the state of Pennsylvania would be furthered if the law of Pennsylvania were applied to Defendant Piper. No Pennsylvania governmental interest, however, would be promoted by the application of Pennsylvania law to Defendant Hartzell. Since none of the decedents nor their relatives were Pennsylvania citizens, Pennsylvania's interest in compensating its injured citizens is of little weight. While the interest of Pennsylvania in applying its laws is indeed slight, neither of the other forums has any apparent interest in applying their laws and we therefore assume that California courts would apply Pennsylvania law under the choice of law rules of California.

In summary, under the California choice of law rules, it appears the law of Scotland would be applied to Defendant Piper with respect to the wrongful death laws. Under this interpretation, Plaintiff would not be a proper litigant. Second, the strict liability law of Pennsylvania

would likely apply to Defendant Piper and not the negligence law of Scotland.

Next, we will briefly review the law that should apply to Defendant Hartzell under Pennsylvania choice of law rules. As Plaintiff accurately points out in her brief, the courts of Pennsylvania follow the significant contacts approach. In *Griffith v. United Airlines,* 416 Pa. 1, 203 A. 2d 796 (1964), the Supreme Court of Pennsylvania adopted the rule of the Restatement Second of Conflicts of Laws, section 145, which states that in a tort action, the rights and liabilities of the parties are determined by the local law which has the most significant relationship to the occurrence or to the parties. "To determine which law has the most significant relationship, the court is instructed to consider: the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, place of incorporation, or the place of business of the parties; and the place where the relationship between the parties is centered." *Lewis v. Chemetron Corporation,* 448 F. Supp. 211, 212 (W. D. Pa. 1978); *Zurzola v. General Motors Corporation,* 503 F. 2d 403 (3d Cir. 1974); *Samuelson v. Susen,* 576 F. 2d 546 (3d Cir. 1978). Any analysis of the relevant contacts in the instant suit leads to the inevitable conclusion that the courts of Pennsylvania would apply the law of Scotland to this action.

To reiterate some of the crucial aspects of the contacts, we begin with the fact of the accident in Scotland. The conduct giving rise to the injury occurred in one of three places, Ohio, Pennsylvania, or Scotland. The real parties in interest are domiciled in Scotland, are residents of Scotland, while the Defendants are located in Ohio and Pennsylvania. We will not outline the contact in any more detail as we find the weight of the contacts with Scotland

to be overwhelming. We hold that the law of Scotland would apply in the instant action to Defendant Hartzell.

We will now once again turn our attention to the public interest factors of *Gulf Oil*. As *Gulf Oil* recognized an extremely important factor in the balance of interests is the fact that foreign law will govern all or part of a case. 330 U. S. at 508, 67 S. Ct. 839; *see also, Farmanfarmaian v. Gulf Oil Corporation*, 437 F. Supp. 910, 924 (S. D. N. Y. 1977); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 816 (S. D. N. Y. 1972); *Michell v. General Motors Corporation*, 439 F. Supp. 24, 27 (N. D. Ohio 1977); *DelRio v. Ballenger Corporation*, 391 F. Supp. 1002, 1004 (D. S. C. 1975); *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499, 502 (2d Cir. 1966); *McCarthy v. Canadian National Railways*, 322 F. 1197 (D. Mass. 1971). We have determined that Scottish law will govern part of this case. We, of course, are not familiar with the law of Scotland and would have to rely on experts from that country. *See, Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448 (2d Cir. 1975). Clearly, it would be better for all parties for this case to proceed in a court in Scotland that is at home with the law of that country. This case is further complicated by the fact that different laws would apply to different parties. The result of this would no doubt cause hopeless confusion and would likely lead to inconsistent or an inequitable result if a trial were held here. Dismissal of this action avoids unnecessary problems of conflict of laws and the application of foreign law.

Another factor that Gulf Oil suggests that we consider is the unfairness of burdening citizens in this forum with jury duty when this forum has little connection with the controversy. The only connection with this forum is that the plane was manufactured in this district years before this accident. Trial of this case would take weeks and we do find that it would be an unfair burden to impose this

on the citizens in this community. Also, it would be a huge burden on this court in terms of both time and the costs involved. Our court is too congested for us to try an action that belongs in a foreign forum. *See, Gulf Oil* at 508, 509, 67 S. Ct. 839; *DelRio v. Ballenger Corporation,* 391 F. Supp. 1002, 1005 (D. S. C. 1975); *Michell v. General Motors Corporation,* 439 F. Supp. 24, 28 (N. D. Ohio 1977); *Domingo v. States Marine Lines,* 340 F. Supp. 811, 816 (S. D. N. Y. 1972); *Dahl v. United Technologies Corporation,* 472 F. Supp. 696, 701 (D. Del. 1979).

If we attempted to try this action in this forum the administrative and legal difficulties would be extreme. The legal problems include determining the serious and complex conflict of law questions, which this memorandum has only touched on. Likewise, the large numbers of witnesses that would be needed from Scotland, the British Isles, Ohio, and California would likely cause administrative difficulties. The physical evidence is in Scotland or the British Isles. We also note that Scotland has a large interest in the outcome of this litigation as it occurred in its airspace. The case thus may shed light on considerations which affect the safety of its citizens. *See, Fitzgerald v. Texaco, Inc.,* 521 F. 2d 448 (2d Cir. 1975). All of these matters lead us to conclude that the public interest would be better served by a trial in Scotland.

That the law of Scotland is not as helpful to the real parties in interest is not a weighty consideration. We must determine which forum is proper because of convenience and the interests of justice and the decision cannot be correctly made if the amount of a plaintiff's likely award is given undue weight. Generally, the cases that have been dismissed on the ground of *forum non conveniens* all involve situations where a party enters a forum with hope of seeking more liberal rules of recovery. If the foreign law that ought to govern a case does not protect its citizens as

fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum. *See e.g., Michell v. General Motors Corporation,* 439 F. Supp. 24, 27 (N. D. Ohio 1977); *Texaco Trinidad v. Astro Exito Navegacion S. A.,* 437 F. Supp. 331, 333-34 (S. D. N. Y. 1977); *Fitzgerald v. Texaco, Inc.,* 521 F. 2d 448, 453 (2d Cir. 1975).

The Plaintiff by brief and at oral argument asserted that the Defendants should be estopped from seeking dismissal of this action on *forum non conveniens* grounds. No cases are cited in support of that proposition and we believe that is a sufficient indicator of the merit of that argument. Plaintiff argues that since the case has been transferred once before and for the reasons stated by Defendants in their briefs that they should now be estopped from arguing that the Middle District is not a proper forum. A reading of the briefs filed by Plaintiff in response to the transfer motion, in accordance with this argument, would lead us to conclude that Plaintiff should be estopped from raising this argument. The papers filed concerning the motion to transfer are, of course, irrelevant to the question we have decided. They were filed early on in this proceeding before many of the important facts of this case were uncovered. Also, Defendants should not be punished for their failure to file a motion to dismiss for *forum non conveniens* first, instead of the motion to transfer. If they would have filed such a motion we feel sure that the California district court would have likewise dismissed this action.

The action will be dismissed on the conditions that the Defendants waive any defense that they might have relating to any statute of limitations that did not exist prior to the initiation of this suit and that they abide by their stipulation to submit to the jurisdiction of the Scottish courts.

Order of the United States District Court for the Middle District of Pennsylvania, Gaynell Reyno, as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, Plaintiffs v. Piper Aircraft Company, a Corporation; Avco Lycoming Engine Group, a Division of Avco Corporation; Hartzell Propeller, Inc., a Corporation, Defendants, Civil Action No. 77-1159, Filed October 19, 1979.

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 77-1159

GAYNELL REYNO, Personal Representative of WILLIAM FEHILLY, LIAM STUART FEHILLY, WILLIAM JAMES McDOUGALL STORM, DAVID VINCENT MORAN and PETER CUNNINGHAM SCOTT,

Plaintiffs

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE DIVISION, a Division of Avco Corporation; HARTZELL PROPELLER, INC., a corporation,

Defendants

Order.

AND NOW, this 19th day of October, 1979, in accordance with the memorandum this day filed, IT IS ORDERED

that this action be and is hereby dismissed on the ground of *forum non conveniens.*

IT IS FURTHER ORDERED that the defendants shall waive any statute of limitation defense that they may have in the courts of Scotland and that they submit to the jurisdiction of the courts of Scotland as a condition to the above ordered dismissal.

/s/ R. DIXON HERMAN
R. Dixon Herman
United States District Judge

Judgment of the United States Court of Appeals for the Third Circuit, Gaynell Reyno, as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, Appellant v. Piper Aircraft Company, a Corporation; Avco Lycoming Engine Group, a Division of Avco Corporation; Hartzell Propeller, Inc., a Corporation, Appellees, No. 79-2747, Dated July 24, 1980.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott,

Appellant

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

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(D. C. Civil No. 77-1159)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: ADAMS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

Judgment.

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel, on May 22, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 19, 1979, be, and the same is hereby reversed and the cause is remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:

/s/ THOMAS F. QUINN
Thomas F. Quinn
Clerk

July 24, 1980

Order of the United States Court of Appeals for the Third Circuit Granting Motion of Appellee, Hartzell Propeller, Inc., for an Extension of Time to File Petition for Rehearing to August 15, 1980, Gaynell Reyno, as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, Appellant v. Piper Aircraft Company, a Corporation; Avco Lycoming Engine Group, a Division of Avco Corporation; Hartzell Propeller, Inc., a Corporation, Appellees, No. 79-2747, Dated August 7, 1980.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 6, 1980

No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott,

Appellant

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

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Present: ADAMS, *Circuit Judge.*

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1. Motion by appellee, Hartzell Propeller, Inc., for an extension of time to file petition for rehearing to August 15, 1980, in the above-entitled case in which the opinion was filed and the judgment entered on July 24, 1980.

Respectfully,

/s/ SALLY MRVOS
Clerk

mgp
enc.

The foregoing Motion is granted.

By THE COURT,

/s/ ARLIN ADAMS
Judge

Dated: August 7, 1980

Order of the United States Court of Appeals for the Third Circuit Denying the Petition for Rehearing En Banc, Gaynell Reyno, as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, Plaintiffs v. Piper Aircraft Company, a Corporation; Avco Lycoming Engine Group, a Division of Avco Corporation; Hartzell Propeller, Inc., a Corporation, Appellees Civil Action No. 77-1159, Dated August 27, 1980.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO, etc.,

Appellant

v.

PIPER AIRCRAFT COMPANY, et al.
(C. A. No. 77-1159)

Sur Petition for Rehearing En Banc.

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

The petition for rehearing filed by Appellee, Hartzell Propeller, Inc., in the above entitled case having been submitted to the judges who participated in the decision of

this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ ARLIN M. ADAMS
Circuit Judge

Dated: August 27, 1980

Affidavit of Ronald C. Scott, Reyno v. Piper Aircraft Co., 479 F. Supp. 727 (M. D. Pa. 1979).

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 77-1159

GAYNELL REYNO, Personal Representative of WILLIAM FEHILLY, LIAM STUART FEHILLY, WILLIAM JAMES McDOUGALL STORM, DAVID VINCENT MORAN and PETER CUNNINGHAM SCOTT

v.

PIPER AIRCRAFT CORPORATION, et al

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss:*

RONALD C. SCOTT, first being sworn, deposes and says that he is a member of the Bar of the Supreme Court of Pennsylvania, having attorney identification no. 13494, and that he is attorney for defendant, Hartzell Propeller, Inc., and is authorized to take this affidavit; that he has conducted an investigation into the accident from which this litigation arises and that the facts set forth below are true to the best of his knowledge, information and belief:

1. The aircraft involved in the accident, in which plaintiff's decedents appear to have been killed, had been manufactured in Pennsylvania prior to 1970 and sold to an American aircraft dealer.

2. That the aircraft involved in the accident was and had for a long time been owned, operated and maintained by an English air charter company which does not appear to do business in the United States.

3. That the pilot of the aircraft was a commercial pilot, a citizen and resident of Scotland and in the employ and within the course and scope of his employment as a pilot for a Scottish air taxi company, which does not appear subject to service of process in the United States.

4. That all maintenance on the aircraft for several years prior to the accident appears to have been done in Great Britain with none of it accomplished in the United States.

5. That, at the time of the accident, the aircraft was on a commercial air charter within the British Isles and was flying from England to Scotland.

6. That the accident here involved occurred in Scotland.

7. That all of the decedents appear to have been citizens and residents of Scotland.

8. That the British Department of Trade investigators found post accident indications that the nuts on all four of the mounting bolts of the propeller governor were loosened to the point at which a substantial loss of oil would occur, completely depleting the engine's oil supply in a matter of minutes.

9. That the British Department of Trade investigators found signs at the site of the accident which could be interpreted to indicate that the engine with the four loosened nuts and presumed oil leak was not developing power when the aircraft crashed.

10. That the British Department of Trade investigators found signs at the accident scene which could be interpreted as indicating that the aircraft had struck the ground in a tail spin after the pilot lost control of the aircraft upon losing power in the one engine.

11. That he has consulted with Hartzell Propeller, Inc. and with counsel for Piper Aircraft Corporation, the only two defendants who have been served in this matter, and has obtained their agreement to accept service of process in an action on behalf of the proper parties which is promptly and timely brought in Scotland.

12. That he has determined that the statute of limitations for bringing an action arising out of this accident in Scotland has not yet expired.

13. That the wreckage of the aircraft, all witnesses to the accident and subsequent investigation and all witnesses on issues relating to damages are in the British Isles and available to an action in Scotland.

RONALD C. SCOTT
Ronald C. Scott

Sworn to and subscribed before me this 12th day of May, 1978.

JUNE P. MCNAIR
Notary Public, Phila., Phila. Co.
My Commission Expires Mar. 1, 1982

Certified from the record
Date October 28, 1980
DONALD R. BERRY, *Clerk*
Per (Name illegible)
Deputy Clerk

Affidavit of Robert H. Arnold, Dahl v. United Technologies Corp., 472 F. Supp. 696 (D. Del. 1979) (without exhibits).

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MAREN DAHL, Personal Representative of the Estate of STALE DAHL, Deceased,	Civil Action No. 78-363
and	
ANNE MARIE DRANGELD, Personal Representative of the Estate of OLAN DRANGELD, Deceased,	Civil Action No. 78-364
and	
BJORD TURID FOSEN, Personal Representative of the Estate of JAN FOSEN, Deceased,	Civil Action No. 78-365
and	
INGUNN KOPPERGARD, Personal Representative of the Estate of AGE KOPPERGARD, Deceased,	Civil Action No. 78-366
v.	
UNITED TECHNOLOGIES CORPORATION.	

AFFIDAVIT OF ROBERT H. ARNOLD

STATE OF CONNECTICUT }
COUNTY OF HARTFORD } SS.

The undersigned Robert H. Arnold, being duly sworn, deposes and says:

1. I am employed by United Technologies Corporation ("UTC") in the position of Assistant Secretary and Assistant General Counsel. I reside in Glastonbury, Connecticut. I make this Affidavit in support of UTC's Motion to Dismiss under the doctrine of *forum non conveniens* in the above-captioned cases.

2. As part of my duties as Assistant General Counsel in the Legal Department of UTC, I have attempted to become familiar with the facts and circumstances surrounding an accident on November 23, 1977, involving a helicopter model S-61N, manufactured by the Sikorsky Division of UTC, with serial number 61475 (hereinafter the "helicopter").

3. Defendant UTC was incorporated under the laws of Delaware and maintains its principal place of business in Hartford, Connecticut.

4. The helicopter was manufactured in 1970 by the Sikorsky Division of UTC in Stratford, Connecticut. The helicopter was sold by United Aircraft International, Inc., a subsidiary of UTC, to All Nippon Airways Co., Ltd., a corporation organized and existing under the laws of Japan and having an office in Tokyo, Japan ("All Nippon" or "buyer") pursuant to a lease Agreement and option to purchase dated November 10, 1970 (a copy of the aforesaid Agreement is attached hereto as Exhibit "A"). Under the Agreement, Article XV, UTC's liabilities are limited to repair and replacement, are subject to notice of defect, and are limited to one year from the date of delivery which was to be December 30, 1970. (Exhibit "A", Article XV, ¶ C). Implied warranties, including the implied warranty of merchantability, are disclaimed and the disclaimers are appropriately typed in all capital letters. (Exhibit "A", Article XV, ¶ D). The sale and delivery of the helicopter occurred in Connecticut.

5. All Nippon also contracted with United Aaircraft International, Inc. to purchase certain equipment for installation on the helicopter, pursuant to a Contract dated November 10, 1970 (said Contract is attached hereto as Exhibit "B"). Some of the alternative optional equipment purchased by All Nippon pursuant to the Contract were navigational equipment (Exhibit B, supplemental ¶ 3.15.1 and supplemental ¶ 3.17.3.1). The helicopter was equipped with All Nippon's selected optional equipment and with certain equipment provided by All Nippon (Exhibit B, supplemental ¶ 13.12). Pursuant to the Contract it was delivered to All Nippon on January 5, 1971. United Aircraft International, Inc. contracted to furnish All Nippon with a crew chief to assist All Nippon with routine maintenance of the helicopter for a three-month period commencing January 24, 1971. Thereafter, UTC, Sikorsky and United Aircraft International, Inc. had no further contact with the helicopter. Upon information and belief, I understand that the helicopter was sold by All Nippon to Helikopter Service A. S. (hereinafter "Helikopter"), a Norwegian corporation in April, 1976. UTC does not know the terms of the sale by All Nippon of the helicopter to Helikopter, or the condition or nature of the helicopter at the time of the sale between those parties.

6. I learned shortly after November 23, 1977, that the helicopter was involved in an accident in the Norwegian waters approximately thirty (30) miles off the coast of Norway. Upon information and belief, the helicopter at the time of the accident was owned and operated by Helikopter and the passengers and crew, consisting of twelve foreigners were lost. Upon information and belief, the helicopter may have been flying quite low in icing rain and the crew might have become disoriented. Upon information and belief, apparently the helicopter struck the

water very hard, causing the pilot to be thrown through the windshield.

7. Based upon my investigation of the accident and the Complaints filed herein, upon information and belief, the following facts lead me to conclude that the relevant evidence is located in Norway:

(a) The helicopter was based and maintained in Norway;

(b) The crash occurred and the wreckage is located in Norway;

(c) The owner and operator of the helicopter has its place of business in Norway;

(d) The records for the flight crew are kept in Norway;

(e) The records, including maintenance and operational records, for the helicopter, are located in Norway;

(f) The investigation of the probable cause of the accident is being conducted by the Norwegian Civil Aviation Administration;

(g) The majority of the witnesses, if not all, whose testimony would be relevant on the facts surrounding the accident, including the Norwegian government's officials who investigated the accident, are located in Norway;

(h) The witnesses who might testify as to plaintiffs' damages are located in Norway.

8. UTC has retained an attorney in Norway, Frode Ringdal, of the law firm of Wikborg, Rein, Ringdal and Walegaard, of Oslo, Norway, to represent UTC's interests and act on behalf of UTC in connection with any legal matters relating to this accident.

9. UTC believes that any lawsuits by plaintiffs against UTC in connection with this accident should be brought in Norway, which has a greater interest in this accident and the appropriate payments, if any, to the plaintiffs, and where the relevant evidence and, presumably, the relevant law, is located. Based upon these beliefs, UTC is prepared to stipulate and consent to service upon it in any action brought in Norway by the plaintiffs herein if these Complaints in Delaware are dismissed and UTC is prepared to make witnesses and documents available and to adjudicate this controversy in Norway and to pay a judgment, if any, rendered against it in Norway.

ROBERT H. ARNOLD

SWORN TO AND SUBSCRIBED before me this 8th day of November, 1978.

MARY R. RAIMO
Notary Public
My Commission Expires Mar. 31, 1980

CERTIFIED:

AS A TRUE COPY:

ATTEST:

J. R. MCALLISTER, JR., *Clerk*
BY MARLENE A. GUYAR
Deputy Clerk

Affidavit of Frode Ringdal, Dahl v. United Technologies Corp., 472 F. Supp. 696 (D. Del. 1979).

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Maren, Dahl, personal representative of the estate of Staale Dahl, deceased,	Civil Action No. 78-363
and	
Anne Marie Drangeid, personal representative of the estate of Olav Drangeid, deceased,	Civil Action No. 78-364
and	
Bjorg Turid Fosen, personal representative of the estate of Jan Fosen, deceased,	Civil Action No. 78-365
and	
Ingunn Koppergaard, personal representative of the estate of Aage Koppergaard, deceased,	Civil Action No. 78-366
v.	
United Technologies corporation	

AFFIDAVIT OF FRODE RINGDAL

KINGDOM OF NORWAY
CITY OF OSLO } *ss:*
EMBASSY OF U. S. A.

The undersigned, Frode Ringdal, being duly sworn, deposes and says:

1. I reside at Sondreveien 21, Oslo 3, Norway.

2. I am a citizen by birth of the Kingdom of Norway. I was admitted to practice law in the Kingdom of Norway in 1952 and since that time, have engaged in the practice of law before the courts of Norway. I am a partner in the law firm of Wikborg, Rein, Ringdal & Waelgaard, with principal office in Kronprinsesse Marthas plass 1, Oslo 1, Norway. I am a member of the Norwegian Bar Association and have for many years been the Chairman of its Committee on Maritime Law. I am also a member of the Norwegian Maritime Law Association, of which I have for six years been the Honorary Secretary and of which I am currently the Vice President. I have for many years been a Titular Member of the Comité Maritime International and have participated actively in its work. Thus I have served on its sub-committee for the drafting of a convention on maritime liens and mortgages which resulted in the Brussel Convention of May 27th 1967. I have been the Chairman of the CMI sub-committee on Offshore Mobile Craft which prepared a draft convention on the legal status of such craft which was adopted at the CMI XXXI conference in Rio de Janeiro, September 1977. And I have in the CMI as well as in the IMCO participated in the work preparing a draft convention on civil liability for oil pollution damage which resulted in the Brussel Convention of November 29th 1969. Furthermore, I have published several articles on maritime law in Scandinavian legal journals and I have lectured on topics in that field. I have also to quite some extent served as arbitrator in international maritime disputes. Finally, I have over the years been dealing with a number of aviation matters. I am fluent in English, German and the Scandinavian languages. This Affidavit has been given by me in English without translation. I submit this Affidavit in support of United Technologies Corporation's

("UTC") motion to dismiss in the cases appearing in the caption at the commencement of this Affidavit.

3. I and my firm represent UTC in connection with any legal matters arising out of a crash of a helicopter off the shores of Norway on November 23, 1977. I first became aware of the crash from extensive newspaper coverage in Norway of the accident.

4. I have read the complaints against UTC filed in Delaware by the representatives of the four Norwegians killed in the accident: Staale Dahl, Olav Drangeid, Jan Fosen and Aage Koppergaard. I also know that the owner and operator of the helicopter at the time of the crash was Helikopter Service A/S ("Helikopter"), which is incorporated in Norway and which, to the best of my information, only does business in Norway and the North Sea.

5. The Norwegian courts will entertain jurisdiction over UTC, if UTC will subject itself to jurisdiction in Norway. Section 29 of the Civil Procedure Act of 1915 of Norway, provides that any person having caused damages is subject to jurisdiction in the district where the accident occurred.

Section 29 is made applicable to the Norwegian Continental Shelf through an interpretation of Section 51 and Section 56 of a Royal Decree of December 8, 1972, "Relating to Exploration for and Exploitation of Petroleum".

(A) Section 51 of the said Royal Decree provides that the Norwegian law of torts is applicable on the continental shelf in cases of accidents caused in connection with the exploitation of petroleum. Section 56 further provides that disputes in such cases are to be decided by the Oslo City Court.

(B) A Norwegian court may also entertain jurisdiction over UTC pursuant to Section 32 of the Civil Procedure

Act of 1915, if UTC has assets in a jurisdiction in Norway, the plaintiffs in such action are not limited in their claims to the value of the property present in the jurisdiction.

(C) In addition, pursuant to Section 24 of the Civil Procedure Act of 1915, jurisdiction may be entertained by our courts over any person representing UTC if such person is present in Norway and service may be made upon him there. I have been authorized by UTC to accept service on UTC by any of the representatives for Dahl, Drangeid, Fosen and Koppergaard, in connection with this accident, if these pending suits in Delaware are dismissed.

6. Norway also has appropriate substantive law applicable to these claims. Such law provides for liability based on negligence. Norway is in the process of developing case law built up around product liability cases.

7. Claims against UTC can be brought in Norway for injuries and damages arising out of this accident within three years after the suffering parties obtain knowledge of the injuries. Assuming that the accident was known immediately to the plaintiffs, the claims can be brought in Norway any time prior to November 23, 1980.

8. Under Norwegian law, the owner-operator of the helicopter in question, Helikopter, is subject to liability under the Norwegian Aviation Act. Under Sections 133 and 136, the owner-operator of the helicopter is liable based upon negligence and the burden is upon the owner-operator to show that it and its employees acted properly. However, under Section 138A of the Norwegian Aviation Act, the maximum liability of the owner-operator is limited to Nkr. 330.000 (or dollars 67.350 at an exchange rate of dollar 1,- to Nkr. 4,90).

9. However, UTC is not subject to any monetary limitation on liability, unlike the owner-operator under Section

138A and, thus, under Norwegian law UTC's liability is unlimited.

10. Based upon my experience as an attorney, it is my belief that the relevant evidence, as well as relevant law, are located in Norway, including the following:

(A) The witnesses who would have testimony relevant to the facts as to the accident and the maintenance and operation of the helicopter would be Norwegian. These witnesses include the employees of the owner and operator of the helicopter, Helikopter, and Norwegian governmental officials who investigated the accident.

(B) The records for the helicopter that would be relevant to me are maintenance and operational records which are kept in Norway by Helikopter, and which could be obtained if this action were litigated in Norway. Similarly, the flight crew's records are kept with Helikopter and would presumably only be available in Norway.

(C) Clearly all witnesses having testimony relevant to the damages are Norwegians, including the families and relatives of the decedents.

(D) I understand that the recovered portion of the wreckage of the helicopter is presently located in Norway.

(E) There may be Norwegians from other companies and firms who have serviced and worked on the helicopter or who have made installations on the helicopter, whose testimony would be relevant to this litigation.

11. According to the national social insurance scheme the decedents estates are entitled to a fixed amount—for the time being Nkr. 3.675 to cover funeral expenses for the deceased.

A widow will receive a yearly pension amounting to max. Nkr. 45.516, provided that the deceased has been a mem-

ber of the insurance scheme for 40 years and had an average annual income of Nkr. 176.400 through the membership period. If the membership period is shorter than 40 years or the wage is below the said average, the yearly pension will be reduced on a pro rata basis.

If the widow is employed her pension will be reduced with 40 per cent of her annual income.

Furthermore, a widow will receive Nkr. 5.880 for the first child and Nkr. 3.670 for each additional child per year.

12. The Norwegian Aviation Act is based on the premise that claims arising from accidents occurring in Norway will be settled or litigated in Norway. The act was passed in part due to concern in Norway over accidents occurring within its borders and over its territorial waters. Norway's legislation and procedures for compensation and adjudication of rights can best be interpreted by a Norwegian court.

13. In my opinion the courts of Norway can fairly resolve the litigation between UTC and the Norwegian representatives of the decedents. Under the Norwegian judicial system, pretrial rules and procedures allow for the taking of testimony of witnesses not able or duty bound to appear at the trial and demanding production or relevant documents and written evidence. Failure to produce required documents or information will under our rules on evidence be held against and to the prejudice of the party failing to meet the demand for production. It should be noted, however, that contrary to what applies under American law Norwegian procedural law is based on the principle of "free evaluation of evidence" giving the trial judge free discretion to assess and determine the effect of all evidence submitted. In consequence, documentary evidence is admissable to a much larger extent than ap-

pears to be the case before American courts. After the conclusion of the pretrial preparations for trial, a trial will be held. Presumably, if the action is brought under Section 51 of the Decree of December 8, 1972, referred to above, the action will be heard in the Oslo City Court, where the parties can present witnesses and submit documentary evidence and can cross-examine opposing parties' witnesses.

14. At the present time the trial of an action before the City Court of Oslo will normally be held about one year after the suit has been commenced.

Kingdom of Norway
City of Oslo
Embassy of the
United States of America
} SS

FRODE RINGDAL
Frode Ringdal

Sworn to and subscribed before me this 13th day of November 1978, in the Embassy of the U. S. A.

JAMES P. DODD
James P. Dodd
Consul of the United States of America

CERTIFIED:
AS A TRUE COPY:
ATTEST:
J. R. MCALLISTER, JR., *Clerk*
BY MARLENE A. GUYAR
Deputy Clerk